

No. 87-364-CFX  
Status: GRANTED

Title: Public Service Commission of New York, et al.,  
Petitioners  
v.  
Martin Exploration Management Company, et al.

Docketed:  
August 31, 1987

Court: United States Court of Appeals  
for the Tenth Circuit

Vide:  
87-363

Counsel for petitioner: Solomon, Richard A., Shibley, Raymond  
N., Moring, Frederic, Ballentine, Robert S.  
  
Counsel for respondent: Holtzinger Jr., John E., Riedman  
Jr., Kenneth L.

NOTE\* Time to file ext. by White, J. to & inc.  
8/31/87 not cited NB\* Consolidated Gas Transmission  
Co. is not ptr since it did not receive ext of time  
& thus ptn wld be JOT as to it .

Entry	Date	Note	Proceedings and Orders
1	Jul 17 1987		Application for extension of time to file petition and order granting same until August 31, 1987 (White, July 22, 1987).
2	Aug 31 1987	G	Petition for writ of certiorari filed.
9	Sep 21 1987	G	Motion of Williams Natural Gas Company for leave to file a brief as amicus curiae in No. 87-363 filed.
10	Sep 21 1987	G	Motion of Interstate Natural Gas Association for leave to file a brief as amicus curiae in No. 87-363 filed.
4	Sep 22 1987		Order extending time to file response to petition until October 30, 1987.
5	Sep 22 1987		The above extension applies to all respondents.
8	Oct 30 1987	X	Brief of respondents Martin Exploration Management Co., et al. in opposition filed. VIDED.
6	Nov 4 1987		DISTRIBUTED. November 25, 1987
11	Nov 30 1987		Motion of Williams Natural Gas Company for leave to file a brief as amicus curiae in No. 87-363 GRANTED.
12	Nov 30 1987		Motion of Interstate Natural Gas Association for leave to file a brief as amicus curiae in No. 87-363 GRANTED.
13	Nov 30 1987		Petition GRANTED. The case is consolidated with 87-363, and a total of one hour is allotted for oral argument. *****
14	Dec 19 1987		Record filed.
		*	Certified original record and C. A. proceedings received.
15	Dec 22 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
16	Jan 4 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
17	Jan 11 1988		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
18	Jan 14 1988		Brief of respondent CNG Transmission Corp. in support of petition filed. VIDED.
19	Jan 14 1988		Brief of petitioner FERC filed. VIDED.
20	Jan 14 1988		Brief of petitioners Public Service Commn. of NY. et al.

Entry	Date	Note	Proceedings and Orders
			filed.
21	Jan 14 1988	G	Motion of Interstate Natural Gas Association of America for leave to file a brief as amicus curiae filed.
22	Jan 14 1988	G	Motion of Williams Natural Gas Company for leave to file a brief as amicus curiae filed.
24	Jan 26 1988	G	Motion of the Solicitor General for divided argument filed.
23	Feb 5 1988		SET FOR ARGUMENT, Monday, March 28, 1988. (1st case). This case is consolidated with 87-363. 1 hour.
25	Feb 16 1988		Brief of respondents Martin Exploration Management Co., et al. filed. VIDED.
26	Feb 22 1988		Motion of Interstate Natural Gas Association of America for leave to file a brief as amicus curiae GRANTED. Justice White OUT.
27	Feb 22 1988		Motion of Williams Natural Gas Company for leave to file a brief as amicus curiae GRANTED. Justice White OUT.
28	Feb 22 1988		Motion of the Solicitor General for divided argument GRANTED. Justice White OUT.
29	Feb 23 1988		CIRCULATED.
30	Mar 14 1988	X	Reply brief of petitioner Federal Energy Regulatory Commission filed.
31	Mar 17 1988	X	Reply brief of petitioners Public Service Commn. of NY, et al. filed.
32	Mar 28 1988		ARGUED.

87-364

Supreme Court, U.S.

FILED

AUG 31 1987

JOSEPH F. SPANIOL, J.  
CLERK

No. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, *ET AL.*,

*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT  
COMPANY, *ET AL.*,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT

RAYMOND N. SHIBLEY  
BRIAN D. O'NEILL  
LeBoeuf, Lamb, Leiby &  
McRae  
1333 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036  
Counsel for Panhandle  
Eastern Pipeline Company

FREDERIC MORING  
HERBERT J. MARTIN  
Crowell & Moring  
1001 Connecticut Ave.,  
N.W.  
Washington, D.C.  
20004-2505  
Counsel for Associated Gas  
Distributors

RICHARD A. SOLOMON  
MARK N. MUTTERPERL  
Wilner & Scheiner  
Suite 300  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036

Counsel for The Public Service  
Commission of the State of  
New York

~~STEPHEN WILLIAMS  
General Counsel  
GEORGE G. CARTER  
Senior Attorney  
P.O. Box 2419  
Clarksburg, W. Va. 26302-2450~~

Counsel for Consolidated Gas  
Transmission Corporation

TERRENCE J. COLLINS  
ROBERT BALLANTINE  
P.O. Box 2511  
Houston, Texas 77001

Counsel for Tennessee Gas Pipe-  
Line, A Division of Tenneco Inc.

August 31, 1987

45PP

## QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission properly concluded that Section 121 of the Natural Gas Policy Act, 15 U.S.C. 3331, mandating deregulation of certain categories of gas, makes inapplicable to such gas all ceiling price categories of the Act.<sup>1</sup>

<sup>1</sup>The parties and their alignment in the court of appeals are as follows:

Petitioners: Martin Exploration Management Company, Colorado Energy Corporation, Phillips Petroleum Company, Phillips Oil Company, Exxon Corporation, Shell Off-Shore, Inc., Shell Western E&P, Inc., Independent Oil & Gas Association of West Virginia, and Amoco Production Company.

Respondent: Federal Energy Regulatory Commission.

Intervenors: Arco Oil & Gas Company, Ohio Oil and Gas Association, Independent Oil and Gas Association of West Virginia, Gulf Oil Corporation, successor to Chevron, U.S.A., Inc., Union Oil Company of California, Champ-lin Petroleum Company, Pennzoil Company, Pennzoil Oil & Gas, Inc., Pennzoil Producing Company, Placid Oil Company, Tennessee Gas Pipeline Company, a division of Tenneco, Pacific Gas & Electric Company, Amoco Production Company, Transok, Inc., Oklahoma Natural Gas Company, a division of Oneok, Inc., Associated Gas Distributors, Public Service Commission of the State of New York, Pacific Lighting Gas Supply Company, Southern California Gas Company, Consolidated Gas Transmission Corporation, Panhandle Eastern Pipe Line Company, Cities Service Oil and Gas Corporation, Grace Petroleum Corporation, Valero Transmission Company, BHP Petroleum Company, Inc., successor to Monsanto Oil Company, Texas Eastern Transmission Corporation, Transwestern Pipeline Company, United Gas Pipe Line Company, United Texas Transmission Company, and Texas Gas Transmission Corporation.

Pursuant to Rule 28, we include as an Addendum hereto a listing naming all parent companies, subsidiaries and affiliates of the corporate petitioners.

## TABLE OF CONTENTS

	Page
Question Presented .....	i
Table of Authorities .....	ii-iii
Opinions Below .....	1
Jurisdiction .....	2
Statutes and Regulations Involved .....	2
Statement .....	3
Reasons for Granting the Writ .....	7
Conclusion .....	12
Addendum .....	1a

## TABLE OF AUTHORITIES

	Page
<i>Cases:</i>	
<i>Associated Gas Distributors v. FERC</i> , No. 85-1811 (D.C. Cir. June 23, 1987) .....	7
<i>Chemical Mfgs. Assn. v. Natural Resources</i> <i>Defense Council</i> , 470 U.S. 116 (1985) .....	8
<i>Chevron, U.S.A. v. Natural Resources Defense</i> <i>Council</i> , 467 U.S. 837 (1984) .....	8,11
<i>Norwegian Nitrogen Products Co. v. United</i> <i>States</i> , 288 U.S. 294 (1933) .....	11
<i>Pennzoil Co. v. FERC</i> , 645 F.2d 360 (5th Cir. 1981) <i>cert. denied</i> 454 U.S. 1142 (1982) .....	4
<i>Young v. Community Nutrition Institute</i> , ____ U.S. _____, 106 S. Ct. 2360 (1986) ....	11
<i>Statutes and Regulations:</i>	
Natural Gas Act, 15 U.S.C. 717 <i>et seq.</i> .....	4

	Page
<i>Statutes and Regulations (Cont'd.):</i>	
Natural Gas Policy Act of 1978, 15 U.S.C.	
3301 <i>et seq.</i> . . . . .	3, 7, 9
Section 100, 15 U.S.C. 3301 . . . . .	11
Section 101(b) (5), 15 U.S.C. 3311(b) (5) . . . . .	2, 5, 6, 9, 11
Section 101(b) (9), 15 U.S.C. 3311(b) (9) . . . . .	5
Section 107(c) (5), 15 U.S.C. 3317(c) . . . . .	4, 5, 8
Section 108, 15 U.S.C. 3318 . . . . .	4, 5, 10
Section 121, 15 U.S.C. 3331 . . . . .	2, 4, 8, 9, 10, 11
Section 601(c), 15 U.S.C. 3431 . . . . .	8
18 C.F.R. 270.208 (1986) . . . . .	3
<i>Miscellaneous:</i>	
124 Cong. Rec. 38363 (1978) . . . . .	9

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

No. \_\_\_\_\_

PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, *ET AL.*,

*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT  
COMPANY, *ET AL.*,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT

The Public Service Commission of the State of New York, Associated Gas Distributors, ~~\_\_\_\_\_~~, ~~\_\_\_\_\_~~, Panhandle Eastern Pipe Line Company and Tennessee Gas Pipeline, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

**OPINIONS BELOW**

The order of the court of appeals denying rehearing and modifying the initial panel opinion (App. B, pp. 29a-31a) is unreported.<sup>2</sup> The initial opinion of the court of appeals (App. A, pp. 1a-28a) is reported in 813 F.2d 1059. Order Nos. 406 (App. E, 61a-103a), and 406-A (App. F, 104a-126a) of the

<sup>2</sup>The citation "App." is to the Appendix to the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the Federal Energy Regulatory Commission.

Federal Energy Regulatory Commission are reported at 29 FERC ¶ 61,202 (CCH) (1984), and 29 FERC ¶ 61,335 (CCH) (1984) respectively. Order No. 406-B is reported at 30 FERC ¶ 61,152 (CCH) (1985).

## JURISDICTION

The order of the court of appeals denying timely filed petitions for rehearing was entered on May 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND REGULATION INVOLVED

Section 101(b) (5) of the Natural Gas Policy Act, 15 U.S.C. 3311(b) (5), provides:

3311. Inflation adjustment; other general price ceiling rules

\* \* \* \* \*

(b) Rules of general application.

\* \* \* \* \*

(5) Sales qualifying under more than one provision. If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Section 121 of the Natural Gas Policy Act, 15 U.S.C. 3331, provides in pertinent part:

3331. Elimination of price controls for certain natural gas sales.

(a) General rule. Subject to the reimposition of price controls as provided in section 3332 of this title, the provisions of part A of this subchapter respecting the

maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e) of this section, cease to apply effective January 1, 1985:

\* \* \* \* \*

18 C.F.R. 270.208 (1986) provides:

## Applicability of Section 121

First sales of natural gas that is deregulated natural gas as defined in [28 C.F.R.] § 272.103(a) is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

## STATEMENT

This proceeding involves the determination by the Federal Energy Regulatory Commission ("FERC") that all pricing provisions of the Natural Gas Policy Act of 1978, 15 U.S.C. 3301, *et seq.* (NGPA), cease to apply to the first sales of various types of natural gas when such gas is "deregulated" under Section 121 of the NGPA. Under the FERC's decision, producers cannot rely upon the NGPA to charge maximum ceiling prices which would have been applicable to the gas prior to deregulation.

1. Most of the contracts for the sale of natural gas entered into since the early 1970's, when Congressional legislation to deregulate such sales became likely, have contained separate provisions governing the prices to be paid under regulation and the prices to be paid if and when the sales were deregulated. Typically, the contractual pricing provisions applicable under regulation authorized the producer to charge the maximum lawful price which might thereafter be established by any regulatory authority. Under such "area rate" provisions the producers have been held to be contractually entitled to collect either the maximum price fixed by FERC for the gas under

the Natural Gas Act, 15 U.S.C. 717 *et seq.* ("NGA"), or any wellhead ceiling price established by Congress. *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981) *cert. denied*, 454 U.S. 1142 (1982). The separate pricing provisions applicable to the sales under deregulation generally provided for a stated benchmark price to be applicable as of the date of deregulation subject to periodic renegotiations to arrive at prices reflecting current market conditions.

2. Prior to November 1978, the prices for gas sold by the producers in interstate commerce for resale were determined by the Federal Power Commission, and its successor, FERC, pursuant to provisions of the NGA. This regulatory scheme was drastically altered when Congress enacted the NGPA on November 8, 1978. Under the NGPA, Congress eliminated FERC's authority to fix the just and reasonable rates for first sales of various categories of natural gas and, in its stead, prescribed a series of ceiling prices which were to be maximum lawful prices. The NGPA also provided in Section 121, 15 U.S.C. 3331, for the staggered deregulation on specified dates of certain categories of new and high cost gas.

The NGPA represented a legislative compromise between those who wished to deregulate all gas sales, or all sales of new gas, and those who desired to retain price regulation over all gas, or at least over already flowing gas. Specifically, Congress in the NGPA distinguished between old flowing gas (and certain new gas produced from older reservoirs on old leases in the Outer Continental Shelf), which were to remain permanently subject to regulation, and categories of new and high cost gas, which were to be subject to substantially higher ceiling rates for specified periods expiring in 1979, 1985, or 1987, but which were then to be deregulated pursuant to the provisions of Section 121 of the NGPA. In addition, the NGPA established a third category of higher price ceilings, applicable to either old or new gas, which was produced in small quantities from so-called "stripper wells" (Section 108, 15 U.S.C. 3318) or involved high cost production which FERC found to present extraordinary risks or costs and provided higher ceiling prices (Section 107(c)(5), 15 U.S.C. 3317(c)(5)).

Because some gas would qualify for more than one regulated pricing category, the NGPA provided in Section 101(b) (5), 15 U.S.C. 3311(b) (5), that where gas qualified under more than one ceiling price "or for any exemption from such a price," the provision which "could" result in the highest price shall be applicable. The NGPA also provides, however, before a producer could charge any ceiling price for which its gas otherwise qualifies, the producer would need contractual authority to charge the ceiling price. Section 101(b) (9), 15 U.S.C. 3311(b) (9).

3. In 1984, the FERC initiated a rulemaking proceeding to implement the congressionally required deregulation of major categories of new gas scheduled to become effective on January 1, 1985. *See* 49 Fed. Reg. 36,399 (1984). At issue here is the portion of the FERC's rulemaking which concerns the impact of the mandatory deregulation of certain categories of new gas upon the right of the producer to continue to charge the ceiling price for other categories of gas, primarily Section 107(c) (5) or 108, for which it was also eligible.

Following the filing of extensive comments, the FERC concluded that the pricing provisions of Title I of the Act ceased to be applicable to deregulated gas, and the continuing eligibility of the deregulated gas under pricing provisions not themselves the basis for deregulation did not permit a producer to continue to charge the statutory ceiling prices for the gas. In its order denying rehearing (30 FERC ¶61,152 (CCH) (1985)), FERC explained that:

The statute clearly states that price controls for certain "gas" shall cease to apply January 1, 1985. NGPA Section 121 mandates deregulation for these categories of gas. The fact that some of this gas also qualifies for another gas category does not alter this congressional mandate to deregulate.

The producers had contended (App. E, p. 79a) that they may choose to price deregulated gas at the ceiling rates prescribed for "stripper well gas" under Section 108 of the NGPA or high cost gas under Section 107(c) (5), pursuant to Section 101(b) (5). However, FERC, finding that deregulation is mandatory under Section 121, rejected the producers' argument that

this provision is applicable to the gas at issue here. (App. E, pp. 79a-80a).<sup>3</sup> In addition, FERC concluded that, even if the reference in Section 101(b) (5) to an exemption from a regulated price were applicable, the provision would not allow producers to choose the highest price existing at any given time, whether regulated or deregulated; instead, FERC concluded that producers would still be required to apply the contract's provisions governing post deregulation prices because parties may always negotiate a contract price that would be above a regulated price and, therefore, the deregulated price always "could result in a price higher than a regulated price." *Id.* at 79a.

4. Respondents petitioned to the United States Court of Appeals for the Tenth Circuit for review of FERC's order. A panel of the court of appeals set aside FERC's order on the dual qualification gas issue ruling that "FERC's interpretation is contrary to the clear intent of Congress as expressed in the unambiguous language of Section 101(b) (5) of the NGPA" (App. A, p. 22a).

The court of appeals held (App. A, p. 11a) that "Congress anticipated precisely the question in Section 101(b) (5)." The court first reasoned that Section 101(b) (5) is applicable to deregulated gas because it refers to gas qualifying under the provisions or the subchapter providing for any maximum lawful price or "for any exemption from such a price" and deregulated gas constitutes an "exemption from such a price" (App. A, p. 14a). As to FERC's conclusion that deregulated gas always "could result in the highest price" by contractual agreement, the court said that the regulated price for the gas "could" be higher at a given time because FERC is empowered to raise the ceiling prices for flowing gas to "just and reasonable" levels (App. A, p. 15a) and Section 101(b) (5) "requires a comparison of the applicable price for each category at a particular moment" (*id.* at 16a). The court of appeals recognized

<sup>3</sup>FERC noted (App. E, p. 74a) that the producers themselves had previously argued that this provision was inapplicable, but had changed their position as market conditions changed to make regulated price ceilings more attractive than the provisions of their contracts governing the price for the sale subsequent to deregulation.

that the result of its decision rejecting FERC's interpretation of NGPA is that considerable gas will be sold at higher regulated prices when contract prices geared to market conditions are at a lower level, a result Congress did not envision. But it concluded that the result was due to Congress' lack of foresight and was a matter for legislative overview (App. A, pp. 23a-24a).

On May 1, 1987, the court of appeals denied rehearing and the suggestion for rehearing *en banc* (App. B, p. 31a).

### REASONS FOR GRANTING THE WRIT

1. This case presents a recurring question of great importance to the regulation of natural gas under the Natural Gas Policy Act, 15 U.S.C. 3301, *et seq.*, as to whether the deregulation of certain categories of new or high cost natural gas makes inapplicable to such gas all provisions of the Act governing the maximum lawful price at which such gas may be sold. The court of appeals held that producers of deregulated gas may still invoke the Act's provisions whenever the prescribed ceiling price for certain categories of gas for which the deregulated gas would also qualify is higher than the deregulated contract price for the gas. The court of appeals' conclusion would not only thwart the congressional intent of freeing the price of deregulated gas from all regulatory intrusion on market forces, but it would have the immediate and continuing effect of increasing the cost of gas by millions of dollars annually. For this reason, and because FERC's interpretation of the Act it has the responsibility to administer was a reasonable one, consistent with the language, structure and legislative history of the Act, this case presents substantial questions warranting this Court's plenary review.

The immediate effect of overruling FERC's interpretation of the statute will be significantly higher prices for natural gas. Any such increase will, in turn, exacerbate the already massive pipeline take-or-pay burden with which the industry is struggling. *See Associated Gas Distributors v. FERC*, No. 85-1811, slip op. at 75-95 (D.C. Cir. June 23, 1987). We are advised by the Interstate Natural Gas Association of America, the trade association of pipeline companies, that the vast

majority of pipelines transporting and selling gas in the specified categories would be affected by the court of appeals' decision. For the years 1985-1987 alone, the increase in gas costs would exceed three hundred million dollars. Moreover, the impact of the court of appeals' opinion will be a continuing one; as newly developed gas qualifies for treatment as "stripper well" gas under Section 108, or high cost gas under Section 107(c) (5) of the NGPA, producers would be able to charge the ever increasing regulated ceilings for such gas whenever they exceed deregulated contract prices tied to market levels. And all such price increases would automatically flow through to the pipelines' customers pursuant to Section 601(c) of the NGPA, 15 U.S.C. 3431.

2. FERC, in its rule under review, held that Section 121 of the NGPA, providing for the elimination of price controls for certain categories of natural gas, had the effect of removing from price regulation all sales of gas which meet the criteria for deregulation under the section. Specifically, FERC concluded (App. F, p. 109a) that the language providing that, the provisions of Part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall . . . cease to apply" to the gas at the various dates set for deregulation, made the entire regulated pricing mechanism of Part A inapplicable to the first sales of gas which had been deregulated, regardless of whether the gas, prior to deregulation, had qualified for treatment under more than one pricing category, only one of which was expressly deregulated.

The lower court agreed that FERC's construction of Section 121 was a reasonable one which it would normally be required to accept under this Court's rulings, in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), *reh. denied*, 468 U.S. 1227 (1984), and *Chemical Mfgs. Assn. v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985). However, the court of appeals concluded that the language of Section 121 was "ambiguous"<sup>4</sup> and FERC's

<sup>4</sup>The alleged ambiguity stems from the fact that Section 121 only provides for deregulation of specified categories of gas; it was therefore argued by various producer parties that the pricing provisions which "cease to apply" to deregulated gas are limited to those specifically applicable to the listed types of gas being deregulated and other pricing

otherwise reasonable interpretation could not be sustained in the light of the "plain language" of Section 101(b) (5) where, the court concluded, "Congress anticipated precisely [the] question" raised in the present case (App. A, p. 11a).

Section 101(b) (5) establishes a rule of construction under which, where gas "qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable" (15 U.S.C. 3311(b) (5)). The court of appeals construed this language as providing that if a sale of gas which has been "exempted" from any price ceiling by being deregulated pursuant to Section 121 remains qualified for treatment under another regulated price category, the producer has the option, exercisable on a month-by-month basis, to choose whether to price its gas under the terms of its contract or to collect a higher regulated price.

Any interpretation of Section 101(b) (5) which allows producers a permanent option to operate under regulation or deregulation, as it suits their immediate interests, is inconsistent with the legislative history of the Section. As Representative Dingell, House floor leader for the bill which became the NGPA, emphasized in his comprehensive explanatory statement of the bill's intent, Section 101(b) (5):

is intended to facilitate resolution of which ceiling may apply if more than one ceiling price appears applicable. Whichever ceiling price could result in the highest price is the applicable maximum lawful price (emphasis added).

124 Cong. Rec. 38363 (1978).

provisions for which the gas may qualify remain in effect. (App. A, p. 11a). However, Section 121 contains no such limitation. It does not state that the ceiling price specified by Section 102 shall not apply to gas qualifying under Section 102(c), one of the categories of gas deregulated as of January 1, 1985. Instead, it specifies that as of that date *all* "provisions of part A of this subpart respecting the maximum lawful price for the first sale of deregulated gas "shall . . . cease to apply". This includes Section 101(b) (5).

Representative Dingell further explained that the producer's option between two maximum pricing provisions was only available prior to deregulation of the gas involved in the sale:

Another way in which dual determination requests could be appropriate would be in cases in which one determination would yield a short term benefit, while another a long term advantage. Such could be the case where a new well produces new gas and also qualifies as a stripper well. A single proceeding to determine qualification for both designations *would permit the producer to obtain stripper well pricing under Section 108 prior to January 1, 1985 and deregulation as new gas thereafter.*

(*Id.*) (Emphasis added).<sup>5</sup>

FERC's construction does not make the reference to "any exemption to any such price" in Section 101(b) (5) surplusage. On the contrary, assuming that exempted gas refers to gas which has been deregulated under Section 121, the most reasonable interpretation of its purpose is to make clear that where gas qualifies both for deregulation under Section 121 and for a regulated price, the deregulated price will govern because the deregulated price "could" always result in the highest price. The fact that at a particular moment a regulated ceiling price might be higher than the unregulated price does not, as the court of appeals believed, negate this analysis. Since there are no *statutory* limitations on a deregulated price, it always "could" be higher than any regulated ceiling price.

<sup>5</sup>The contrary result reached by the court below would allow the producer to continue to collect the ever increasing ceiling price under Section 108, which is presently at a level of \$4.926 per Dth and increases at 4% per month, plus an inflation per factor. It is inconceivable that Congress intended this ever-increasing rate would be applicable to deregulated gas in perpetuity. Instead, Congress clearly adopted the very high ceiling price for stripper well gas in recognition of the fact that the section would be applicable to "new" gas only until it was deregulated, (after which market forces would prevail), and to old flowing gas (or gas produced from old reserves on old offshore leases) only until the finite reserves of such gas were depleted.

Finally, as FERC said (App. E, pp. 77a-78a), Section 121 of the Act expressly makes all of the provisions of Part A of Title I of the Act, including the rules of construction set out in Section 101(b) (5), inapplicable to deregulated gas. The court of appeals suggested (App. A, p. 13a) that this argument goes too far since it would make inapplicable to deregulated gas all the rules of construction and other provisions contained in Section 101 of the Act. But these provisions are related solely to the computation of the maximum lawful prices set out in Part A of Title I and are not necessary for the proper construction either of Part B thereof, or the remainder of the Act. The definitions of general applicability are, instead, set out separately in Section 100, 15 U.S.C. 3301, which precedes any of the substantive provisions of the Act.

In sum, the court of appeals should have deferred to FERC's construction of the two provisions involved. Here, as in *Young v. Community Nutrition Institute*, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 S. Ct. 2360 (1986), the court of appeals erred in concluding that Congress unambiguously expressed its intent and in failing to defer to the agency's interpretation. FERC has consistently construed Section 121 to mean that all specified categories of gas are deregulated, regardless of whether such gas might also qualify for a regulated ceiling price. FERC's view is formalized in a regulation after extensive comments and analysis. At a minimum, FERC's construction "is based on a permissible construction of the statute," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), *reh. denied*, 468 U.S. 1227 (1984), and FERC's construction is particularly entitled to deference because it is a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND N. SHIBLEY  
BRIAN D. O'NEILL  
LeBoeuf, Lamb, Leiby &  
McRae  
1333 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

Counsel for Panhandle  
Eastern Pipeline Company

FREDERIC MORING  
HERBERT J. MARTIN  
Crowell & Moring  
1001 Connecticut Ave.,  
N.W.  
Washington, D.C.  
20004-2505

Counsel for Associated Gas  
Distributors

RICHARD A. SOLOMON  
MARK N. MUTTERPERL  
Wilner & Scheiner  
Suite 300  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036

Counsel for The Public Service  
Commission of the State of  
New York

~~STEPHEN WILLIAMS  
General Counsel  
GEORGE G. CARTER  
Senior Attorney  
P.O. Box 2450  
Clarksburg, W. Va. 26302-2450~~

Counsel for Consolidated Gas  
Transmission Corporation

TERRENCE J. COLLINS  
ROBERT BALLANTINE  
P.O. Box 2511  
Houston, Texas 77001

Counsel for Tennessee Gas Pipe-  
Line, A Division of Tenneco Inc.

## ADDENDUM

(Listings naming all parent companies, subsidiaries, and  
affiliates of the corporate petitioners)

August 31, 1987

# TENNECO INC. AND SUBSIDIARIES AND AFFILIATES

TENNECO INC. (Delaware)	
Agricultural & Industrial Management, Inc. (Delaware) .	100%
Albright & Wilson Inc. (Delaware) . . . . .	100
Chemrich, Inc. . . . .	100
Brake-Pro Systems Inc. (Delaware) . . . . .	100
DeKoven Manufacturing Co. (Wisconsin) . . . . .	100
East Tennessee Natural Gas Company (Tennessee) . . . . .	100
Eastern Insurance Company Limited (Bermuda) . . . . .	100
ERCO Industries Inc. (Delaware) . . . . .	100
Houston Oil & Minerals Corporation (Nevada) . . . . .	100
Houston Oil & Minerals Exploration	
Company (Texas) . . . . .	100
Houston Oil & Minerals Products Company (Texas) . .	100
Houston Oil International, Inc. (Texas) . . . . .	100
HOCOL, S.A. (Cayman Islands) . . . . .	100
J. I. Case GmbH (Germany) . . . . .	100
J. I. Case S. A. (France) . . . . .	100
Etablissement Lacroix S.A. (France) . . . . .	100
Etablissement L. Bouilloux S.A. (France) . . .	98
Poclain S.A. (France) . . . . .	44
Agencias Petroleras, Ltda. (Colombia) . . . . .	100
Tenneco Espana SA (Spain) . . . . .	100
Tenneco Petrole Gabon, S.A. (Cayman Islands) .	100
Houston Oil & Minerals of Colombia, Inc. (Texas) .	100
Houston Oil & Minerals of Dubai, Inc. (Texas) . . . .	100
Houston Oil & Minerals of The Netherlands,	
Inc. (Texas) . . . . .	100
Houston Oil & Minerals of Tunisia, Inc. (Texas) . . .	100
Houston Oil & Minerals U.K., Inc. (Texas) . . . . .	100
LaTerre Colombia, S.A. (Cayman Islands) . . . . .	100
Tenneco Oil & Minerals of UMM AL-QAIWAIN	
(Texas) . . . . .	100
Tenneco Oil of Gabon, Inc. (Texas) . . . . .	100
Houston Production Company (Texas) . . . . .	100
Houston Royalty Company (Nevada) . . . . .	100
Magrange Inc. (Texas) . . . . .	100
Intake Water Company (Delaware) . . . . .	100
Kern River Corporation (Delaware) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

Kern River Gas Transmission Company (Texas General Partnership) (Kern River Corporation has 50% ownership as General Partner and Williams Western Pipeline Company, an unaffiliated company, has 50% ownership as General Partner)	
Kern River Gas Supply Corporation (Delaware) . . . . .	50%
(50% ownership by The Williams Companies, an outside company)	
Kern River Service Corporation (Delaware) . . . . .	50
(50% ownership by The Williams Companies, an outside company)	
Land Ventures Inc. (Delaware) . . . . .	100
Lorneterm LNG Limited (Canada) . . . . .	100
Midwestern Gas Transmission Company (Delaware) . . . . .	100
Midwestern Gas Marketing Company (Delaware) . . . . .	100
Mineral Tenneco de Panama, S.A. . . . .	100
Monroe Auto Equipment Company (Delaware) . . . . .	100
E-Z Ride Shock Absorber Company (Michigan) . . . . .	100
Monroe Argentina S.A.I.C. y F. (Argentina) . . . . .	100
Monroe Auto Equipement France S.A. (France) . . . . .	100
Monroe Auto Equipment GmbH (Germany) . . . . .	100
Monroe do Brasil Industria e Comercio Ltda. (Brazil) . . . . .	100
Monroe Auto Pecas S.A. (Brazil) . . . . .	80
Monroe Japan Co., Ltd. (Japan) . . . . .	100
Regal Ride Shock Absorber Company (Michigan) . . . . .	100
Sudinpar Holding Etablissement (Liechtenstein) . . . . .	100
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica) . . . . .	98
Tenneco Automotive International Sales Corporation (Delaware) . . . . .	100
New Tenn Company (Delaware) . . . . .	100
Northeastern Gas Transmission Company (Delaware) . . . . .	100
Tenneco Alaska, Inc. (Delaware) . . . . .	100
Tenneco China Trade Inc. (Delaware) . . . . .	100
Tenneco United Company (a Texas General Partnership) (Tenneco China Trade, Inc. has 50% ownership and Indamerica International, Inc., a California corporation has 50% ownership.)	

*Subsidiaries of Tenneco Inc. (continued)*

Tenneco Coal Company (Delaware) . . . . .	100%
Tenneco Communications Corporation (Delaware) . . . . .	100
Tenneco Corporation (Delaware) . . . . .	100
Bloor Automotive Inc. (Delaware) . . . . .	100
Discoverer Services, Inc. (Delaware) . . . . .	100
Blue Flame Gas Corporation (Delaware) . . . . .	100
Car-X Service Systems, Inc. (Delaware) . . . . .	100
Channel Industries Gas Company (Delaware) . . . . .	100
Channel Industrial Sales Company (Delaware) . . . . .	100
Collins Pipeline Company (Delaware) . . . . .	80
Columbine Casualty Company (Colorado) . . . . .	100
G & T Pipeline Company (Delaware) . . . . .	100
International Sourcing and Countertrade Company (Delaware) . . . . .	100
Kern County Land Company (Delaware) . . . . .	100
Boquillas Cattle Company (Arizona) . . . . .	100
J. I. Case Company (Delaware) . . . . .	100
Case Engine Holding Company, Inc. (Delaware) . . . . .	100
Consolidated Diesel Company (North Carolina Partnership) . . . . .	50
Consolidated Diesel, Inc. (Delaware) . . . . .	100
Grand Detour Plow Company (Wisconsin) . . . . .	100
Kase, S.A. De C. V. (Mexico) . . . . .	100
J. I. Case Argentina S.A. (Argentina) . . . . .	100
J. I. Case Credit Corporation (Wisconsin) . . . . .	100
J. I. Case International, S.A. (Venezuela) . . . . .	100
J. I. Case Leasing Corporation (Wisconsin) . . . . .	100
J. I. Case Mfg. Company, Inc. (Wyoming) . . . . .	100
J. I. Case Threshing Machine Company (Wisconsin) . . . . .	100
Pryor Foundry, Inc. (Oklahoma) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Kern County Land Company  
(continued)*

*Subsidiaries of J. I. Case Company (continued)*

Steiger Tractor, Inc. (Delaware) . . . . .	100%
Integrated Technical Systems, Inc. (North Dakota) . . . . .	100
Steiger Australia Ltd. (North Dakota) . . . .	100
Steiger Financial Corp. (Pty) Ltd. (Australia) . . . . .	100
Steiger Canada Ltd. (Canada) . . . . .	100
Steiger Credit Company (North Dakota) . . . . .	100
Steiger Credit Canada Ltd. (Canada) . .	100
Steiger International, Ltd. (Guam) . . . . .	100
Tenneco Canada Inc. (Ontario) . . . . .	100
Dunville Mining Co. Limited (Alberta) . .	100
Electric Reduction Sales Co., Ltd. (Canada) . . . . .	100
ERCO Industries of Canada Limited (Canada) . . . . .	100
J. I. Case do Brasil & Cia. (Brazil) . . . . .	100
Case Capital Assets Management S/C Ltda. (Brazil) . . . . .	100
Productors Andina de Acidos y Derivados Ltda (Colombia) . . . . .	49
Tenneco Credit Canada Corporation (Alberta) . . . . .	100
The Case Company (Wisconsin) . . . . .	100
Pueblo Del Sol Water Company (Arizona) . .	100
Tenneco West, Inc. (Delaware) . . . . .	100
Ag-Ventures, Incorporated (California) . .	100
Cal-Date Company (California) . . . . .	100
California Almond Orchards, Inc. (California) . . . . .	100
California Harvest Shops, Incorporated (California) . . . . .	100
Grandma Mac's Orchard, Inc. (California) .	100
H-M-T Inc. (California) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

Heggblade-Marguleas-Tenneco, Inc. (California) . . . . .	100%
House of Almonds, Inc. (Delaware) . . . . .	100
Kern County Land Company, Inc. (California) . . . . .	100
Kern Island Water Company (California) . . . .	100
Kern River Canal and Irrigating Company (California) . . . . .	98
Sun Giant Sales Corporation (California) . . . .	100
Tenneco Exploration, Ltd. (Texas Limited Partnership) Tenneco Oil Company has 66.66% ownership as General Partner and Tenneco West, Inc. has 33.33% ownership as Limited Partner)	
Tenneco Exploration, Ltd. II (Texas Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco West, Inc. has 50% owner- ship as Limited Partner)	
Tenneco Farming Company (California) . . . .	100
Tenneco Property Development Corporation (California) . . . . .	100
LHC Pipeline Company (Delaware) . . . . .	100
Marlin Drilling Co., Inc. (Delaware) . . . . .	100
Bluefin Supply Company (Delaware) . . . . .	100
Marlin International Drilling Company (Delaware) .	100
Marlin Colombia Drilling Co. Inc. (Delaware) . .	100
Marlin-West Drilling Co., Inc. (Delaware) . . . . .	100
Mitchell Supreme Fuel Company (Delaware) . . . . .	100
Petro-Tex Chemical Corporation (Delaware) . . . . .	100
Philadelphia Life Corporation (Pennsylvania) . . . . .	100
State Gas Pipeline Company (Delaware) . . . . .	100
SWL Development Corp. (Texas) . . . . .	100
Counce Limited Partnership (Texas Limited Partnership) (SWL Development Corp. has 5% ownership as General Partner and Tenneco Credit Corporation has 95% ownership as Limited Partner)	
Counce Finance Corporation (Delaware) . . . .	100
SWL Security Corp. (Texas) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

T & M Terminal Company (Delaware) .....	80%
Tenneco Aviation Limited (Delaware) .....	100
Tenneco Credit Corporation (Delaware) .....	100
Counce Limited Partnership (Texas Limited Partnership) (Tenneco Credit Corporation has 95% ownership as Limited Partner and SWL Development Corp. has 5% ownership as General Partner)	
Counce Finance Corporation (Delaware) ..	100
Tenneco Storage Limited Partnership (Louisiana Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco Credit Corporation has 50% ownership as Limited Partner)	
Tenneco Storage Capital Corporation (Delaware) .....	100
Tenneco Cogeneration Development Company (Delaware) .....	100
Tenneco Financial Services Inc. (Delaware) .....	100
Tenneco Asset Management Company (Delaware) .....	100
Tenneco Asset Planning Company (Delaware) ..	100
Tenneco Inc. (Nevada) .....	100
Tenneco Insurance Company (Delaware) .....	100
Argosy Offshore Ltd. (Texas Limited Partnership) (FC Marine Inc. has 1% ownership as General Partner; Tenneco Insurance Company has 74% ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)	
Tenneco Insurance Ventures Inc. (Delaware) .....	100
Tenneco InterAmerican Inc. (Delaware) .....	100
LIG Chemical Company (Louisiana) .....	100
Louisiana Intrastate Gas Corporation (Louisiana) .....	100
Mid Louisiana Gas Company (Delaware) .....	100
Sunbelt Gas Gathering Company (Delaware) .	100
Newport News Shipbuilding and Dry Dock Company (Virginia) .....	100

*Subsidiaries of Tenneco (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

Asheville Industries Inc. (North Carolina) .....	100%
Greeneville Metal Manufacturing, Inc. (Virginia) .....	100
The James River Oyster Corporation (Virginia) .	100
Newport News Industrial Corporation (Virginia) .....	100
Newport News Industrial Corporation of Ohio (Ohio) .....	100
Newport News Offshore Systems Corporation (Virginia) .....	100
Newport News Reactor Services, Inc. (Virginia) .	100
SBG Puerto Rico, Inc. (Puerto Rico) .....	50
Packaging Corporation of America (Delaware) ....	100
Economy Printing & Lithographing Co. (Texas) .	100
Alcan Ekco Limited (United Kingdom) .....	50
A/S Hastrup-Ekco Aluminum-Emballage (Denmark) .....	50
Plus Pack AB Svenska Hastrup-Ekco (Sweden) .....	100
Plus Pack A/S (Norway) .....	100
Plus Pack GmbH (Austria) .....	100
Plus Pack GmbH (Switzerland) .....	100
Ekco N. V. (Belgium) .....	100
Ekco GmbH (Germany) .....	100
Ekco S.A.R.L. (France) .....	100
Lake States Carriers, Inc. (Illinois) .....	100
Toyo Ekco Company, Ltd. (Toyo Ekco Kubushiki, Kaisha) (Japan) .....	50
Skogstre A/S (Norway) .....	50
Tennessee River Pulp & Paper Company (Delaware) .....	100
The Corinth and Counce Railroad Company (Mississippi) .....	100
Tuscaloosa Pipeline Company (Louisiana) .....	100
Tenneco Minerals Company (Delaware) .....	100
Prometheus Minerals (Canada) Ltd. (Canada) ....	100
Tenneco Minerals Company of Australia, Inc. (Delaware) .....	100
Tenneco Specialty Minerals Company (Delaware) .	100
Windy Point Minerals, Ltd. (Canada) .....	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Tenneco InterAmerica, Inc. (continued)*

Tenneco Oil Company (Delaware) .....	100%
Caldyne, Inc. (Delaware) .....	100
Direct Oil Corporation of Texas (Texas) .....	100
FC Marine Inc. (Delaware) .....	75
(Skips A/S Tudor owns 25%)	
Argosy Offshore Ltd. (Texas Limited Partnership)	
(FC Marine Inc. has 1% ownership as General Partner; Tenneco Insurance Company has 74% ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)	
GEO Oil and Gas Company of Houston (Delaware) .....	100
Greene's Propane Gas Corporation (Georgia) ...	100
HCT Oil and Gas Company (Delaware) .....	100
LaTerre Development Corp. (Delaware) .....	100
LaTerre Petroleum (U.K.), Inc. (Delaware) ....	100
LEDSCO, Ltd. (Pennsylvania Limited Partnership)	
(Tenneco Oil Company has 99% ownership as Limited Partner and One Independence Corporation has 1% ownership as General Partner)	
Resource Oil and Gas Company (Delaware) .....	100
TINCO, Ltd. (Texas Limited Partnership)	
(LEDSCO, Ltd. has 43.3% ownership as Limited Partner and Tenneco Oil Company has 56.7% ownership as General Partner)	
Mistal, Inc. (Delaware) .....	51
Mont Belvieu Land Company (Delaware) .....	100
Multistate Oil Properties, Inc. (Delaware) .....	100
Multistate Oil Properties, N.V. (Netherlands Antilles) .....	100
One Independence Corporation (Delaware) ..	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Tenneco Oil Company (continued)*

LEDSCO, Ltd. (Pennsylvania Limited Partnership)	
(One Independence Corporation has 1% ownership as General Partner and Tenneco Oil Company has 99% ownership as Limited Partner)	
Operators, Inc. (Delaware) .....	100%
Ship Channel Chemicals Company (Delaware) ..	100
TENN-USS Chemicals Company (Texas General Partnership)	
(Ship Channel Chemicals Company has 50% ownership as General Partner)	
TENN-USS Chemicals Finance Corporation (Delaware) .....	50
(100% ownership in TENN-USS Chemicals Company, a Texas Partnership in which Ship Channel Chemicals Company owns 50%)	
Tenneco Exploration, Ltd. (Texas Limited Partnership)	
(Tenneco Oil Company has 66.66% ownership as General Partner and Tenneco West, Inc. has 33.33% ownership as Limited Partner)	
Tenneco Exploration, Ltd. II (Texas Limited Partnership)	
(Tenneco Oil Company has 50% ownership as General Partner and Tenneco West, Inc. has 50% ownership as Limited Partner)	
Tenneco LaTerre, Inc. (Delaware) .....	100
Tenneco Marine Services, Inc. (Delaware) .....	100
Tenneco OCS Company, Inc. (Delaware) .....	100
Tenneco Oil Pipeline Company (Delaware) ....	100
Tenneco Retail Service Company (Delaware) ...	100
Tenneco Retail Service Company of Texas (Texas) .....	100
Tenneco Storate Limited partnership (Louisiana Limited Partnership)	

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Tenneco Oil Company (continued)*

(Tenneco Oil Company has 50% ownership as General Partner and Tenneco Credit Corporation has 50% ownership as Limited Partner)

Tenneco Storage Capital Corporation	100%
TINCO, Ltd. (Texas Limited Partnership)	
(Tenneco Oil Company has 56.7% ownership as General Partner and LEDCO, Ltd. has 43.3% ownership as Limited Partner)	
Viscosity Oil Company (Illinois)	100
Tenneco Oil Company of Nigeria (Delaware)	100
Tenneco Oil of Nigeria Unlimited (Nigeria)	50
Tenneco Phosphate, Inc. (Delaware)	100
Tenneco Polymers, Inc. (Delaware)	100
Tenneco Resins, Inc. (Delaware—in dissolution)	100
Tenneco Eastern Realty, Inc. (New Jersey)	100
Tenneco Synfuels Company (Delaware)	100
Tenneco Uranium, Inc. (Delaware)	100
Tenneco Gas Pipeline Corporation (Delaware)	100
Tennessee Gas Pipeline Corporation (Delaware)	100
Tennessee Overthrust Gas Company (Delaware)	100
Tenngasco Corporation (Delaware)	100
Creole Gas Pipeline Corporation (Louisiana)	100
Tenngasco Exchange Corporation (Delaware)	100
Tenngasco Gas Gathering Company (Delaware)	100
Tenngasco Gas Supply Company (Delaware)	100
HT Gathering Company (Texas)	50
Oasis Pipeline Company (Delaware)	20
Tenngasco Marketing Corporation (Delaware)	100
THC Pipeline Company (Delaware)	100
Walker Deutschland GmbH (Germany)	100
West Africa Corporation (Delaware)	100
Tenneco Oil Company of Nigeria Unlimited (Nigeria)	50
Tenneco Delta XII Gas Co. Inc. (Delaware)	100
Tenneco LNG International Inc. (Panama)	100
Tenneco Energy Ltd. (Canada)	100
Tenneco Foreign Sales Corporation (U.S. Virgin Islands)	100
Tenneco International Energy, Inc. (Delaware)	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

Tenneco International Inc. (Delaware)	100%
A B Starla-Werken (Sweden)	100
J. I. Case Sweden A.B. (Sweden)	100
Sara Gretes Cafeteria AB (Sweden)	50
Tenneco Transicol AB (Sweden)	100
Case Belgium Inc. (Delaware)	100
Case France, S.A. (France)	100
Societe Francaise Immobiliere Franim (France)	100
Tractorwork Iberica, Inc. (Delaware)	100
Case Tracteurs S.A. (France)	100
Case Traktoren GmbH (Germany)	100
Compania de Financiacion Case, S.A. (Spain)	100
Etablissement Robert Bellanger, S.A. (France)	100
Speedy Et Cie SNC (France)	100
(Etablissement Robert Bellanger, S.A. has 99% ownership and Speedy Inc. has 1% ownership)	
J. I. Case (Australia) Pty., Ltd. (Australia)	100
J. I. Case Credit Corporation of Australia Pty. Limited (Australia)	100
J. I. Case (Murray Bridge) Pty. Ltd. (Australia)	100
J. I. Case Norge A/S (Norway)	100
J. I. Case Operations (Europe) Inc. (Delaware)	100
J. I. Case S.A. (Spain)	100
J. I. Case South Africa (Pty.) Ltd. (South Africa)	100
J. I. Case S.W.A. (Proprietary) Ltd. (South West Africa)	100
J. I. Case Sweden Inc. (Delaware)	100
Monroe Australia Proprietary Limited (Australia)	100
Wylie Superannuation Pty. Ltd. (Australia)	100
Omni-Pac GmbH (Germany)	1
Omni-Pac S.A.R.L. (France)	97
Poclain do Brasil S.A. (Brazil)	100
P.P.M. Guindastes Hidraulicos S.A. (Brazil)	99
Riverside Date International, Inc. (Delaware)	100
Tunisian American DATE Company (Tunisia)	49
S.A. Paper Chemicals (Proprietary), Limited (South Africa)	60
S.A. Tenneco Belgium (Poclain-Nibrie-Petro-Tex) N.V. (Belgium)	100
Somadoc N.V. (Belgium)	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

Societe Anonyme Industrielle des Resines (France)	100%
Speedy Inc. (Delaware)	100
Speedy Et Cie SNC (France)	
(Speedy Inc. has 1% ownership and Etablissement Robert Bellanger, S.A. has 99% ownership)	
Tenneco Australia, Inc. (Delaware)	100
Tenneco Automotive Trading Company (Delaware)	100
Tenneco Deutschland Beteiligungs GmbH (Germany)	100
Case Vibromax GmbH (Germany)	98
Case Vibromax GmbH and Co. (Germany)	2
Case Vibromax Australia (Pty) Ltd.	
Vibromax France SARL (France)	99
Vibromax SCI (France)	99
Omni-Pac GmbH (Germany)	99
Omni-Pac ApS (Denmark)	100
Omni-Pac A.B. (Sweden)	100
Omni-Pac S.A.R.L. (France)	3
Pit-Stop Auto Services GmbH (Germany)	100
Poclain GmbH (Germany)	100
Case Poclain GmbH & Co. (Germany)	2
Chance Gesellschaft Fuer Baumachinau MbH	100
Wilhelm Weller, Herstellung und Vertrieb von Strassenwalzen, GmbH (Germany)	100
Vibromax France SARL (France)	1
Vibromax SCI (France)	1
Tenneco Egypt, Inc. (Delaware)	100
Tenneco Far East Exploration and Development Company (Delaware)	100
Tenneco Great Britain Limited (United Kingdom)	100
Tenneco Holdings B.V. (Netherlands)	100
Tenneco Nederland B.V. (Netherlands)	100
Case Poclain GmbH & Co. (Germany)	98
Chance Gesellschaft Fuer Baumachinau MbH (Germany)	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

Gebr. Broere B.V. (Netherlands)	100%
Antwerp United Tanker Agencies N.V. (Belgium)	100
Agence Maritime Eurotank N.V. (Belgium)	100
Depositas Del Norte, S.A. (Spain)	50
Terminales Quimicos S.A. (Spain)	26
Tank Terminals Rotterdam, B.V. (Netherlands)	100
Tankvaart Dordrecht, B.V. (Netherlands)	100
Case Vibromax GmbH und Co. (Germany)	98
Vibromax Australia (Pty) Ltd. (Australia)	100
Tenneco Transicol B.V. (Netherlands)	100
Nederlandsche Bewoid Maarachappij, B.V. (Netherlands)	100
Tenneco Holdings Danmark A/S (Denmark)	100
Case Traktori Oy (Finland)	100
Finnwalker Oy (Finland)	100
Lydex A/S (Denmark)	100
J. I. Case A/S (Denmark)	100
Handelsselskabet af 12/2/76 Roskilde Aps (Denmark)	100
Tenneco International Marketing Company (Delaware)	100
Tenneco International N.V. (Netherlands Antilles)	100
Tenneco International Trading Company (Delaware)	100
Tenneco Norge Inc. (Delaware)	100
Tenneco Norway Oil Company (Delaware)	100
Tenneco Offshore Netherlands Company (Delaware)	100
Tenneco Oil Company of Colombia (Delaware)	100
Tenneco Oil Company Norsk A/S (Norway)	100
Tenneco Oil Company of the Bahamas (Delaware)	100
Tenneco Oil Company of Trinidad (Delaware)	100
Tenneco Oil Cote d'Ivoire, Inc. (Delaware)	100
Tenneco United Kingdom Holdings Limited (Delaware)	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

J. I. Case Europe Limited (Delaware) . . . . .	100%
Case Credit Limited (United Kingdom) . . . . .	100
International Harvester Company of Great Britain Limited (United Kingdom) . . . . .	100
Omni-Pac U.K. Limited (United Kingdom) . . . . .	100
Hartmann Fibre Limited (United Kingdom) . . . . .	100
Tenneco Europe Limited (Delaware) . . . . .	100
Tenneco International Finance Limited (United Kingdom) . . . . .	100
Case Credits Limited (United Kingdom) . . . . .	100
Tenneco International Finance BV (Netherlands) . . . . .	100
Tenneco International Holdings Limited (United Kingdom) . . . . .	100
Albright & Wilson Limited (United Kingdom) . . . . .	100
ACC (Fertilisers) Ltd. (United Kingdom) . . . . .	100
FCL Crop Protection, Ltd. (United Kingdom) . . . . .	100
Robt. Stephenson & Son Ltd. (United Kingdom) . . . . .	100
The Farmers Co. Ltd. (United Kingdom) . . . . .	100
Albright & Wilson A.B. (Sweden) . . . . .	100
Albright & Wilson A/S (Norway) . . . . .	100
Albright & Wilson Asia Trading (H.K.) Limited (Hong Kong) . . . . .	100
Albright & Wilson Asia Trading Pie Limited (Singapore) . . . . .	100
AWAT Thai Ltd. (Thailand) . . . . .	49
Albright & Wilson Asia Trading (Malaysia) Sdn Bhd (Malaysia) . . . . .	100
Albright & Wilson ESP Trustees Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Executive Pension Trustees, Ltd. (United Kingdom) . . . . .	100
Albright & Wilson GmbH (Austria) . . . . .	100
Albright & Wilson Intertrade Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Investments (PTY) Ltd. (Australia) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom Holdings Limited (continued)*

Albright & Wilson (Australia) Limited (Australia) . . . . .	57%
National Brands (PTY), Ltd. (Australia) . . . . .	100
Albright & Wilson New Zealand Limited (New Zealand) . . . . .	100
Albright & Wilson (Langley) Ltd. (United Kingdom) . . . . .	100
Albright & Wilson (Malaysia) SDN, BHD. (Malaysia) . . . . .	100
Albright & Wilson (Marchon) Pte. Limited (Singapore) . . . . .	100
Ethoxylates Manufacturing Pte. Ltd. (Singapore) . . . . .	49
Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom) . . . . .	100
Albright & Wilson (Mfg.) Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Oils SDN BHD (Malaysia) . . . . .	100
Albright & Wilson Overseas Ltd. (United Kingdom) . . . . .	100
Akulu Marchon (PTY) Ltd. (South Africa) . . . . .	50
Akulu Chemicals (PTY) Ltd. (South Africa) . . . . .	100
Marchon-Paragon Holdings (PTY) Ltd. (South Africa) . . . . .	100
Marchon-Paragon Sulphonation (PTY) Ltd. (South Africa) . . . . .	50
Albright & Wilson Aps (Denmark) . . . . .	100
Albright & Wilson BV (Netherlands) . . . . .	100
Albright & Wilson GmbH (Germany) . . . . .	100
Albright & Wilson International Finance BV (Netherlands) . . . . .	100
Albright & Wilson Ireland Ltd. (Eire) . . . . .	100
Albright & Wilson Northern Ireland, Ltd. (United Kingdom) . . . . .	100
Ibex Ltd. (Ireland) . . . . .	100
Thawpit (Ireland) Ltd. (Ireland) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Albright & Wilson Limited (continued)*

*Subsidiaries of Albright & Wilson Overseas Ltd. (continued)*

Albert & Wilson SpA (Italy) . . . . .	100%
Marchon Espanola S.A. (Spain) . . . . .	100
Marchon France S.A. (France) . . . . .	100
Marchon Hellas Ltd. (Greek) . . . . .	100
Marchon Italians SpA (Italy) . . . . .	100
Marchon Sud SpA (Italy) . . . . .	100
Polyphosphates Inc. (Philippines) . . . . .	40
Albright & Wilson Pension Investments Ltd. (England) . . . . .	100
Albright & Wilson Produtos Quimicos Ltda. (Brazil) . . . . .	100
Albright & Wilson Resins and Organics Limited (United Kingdom) . . . . .	100
Albright & Wilson (Sandwell) Ltd. (United Kingdom) . . . . .	100
E. P. Potter & Co. Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Staff Pension Trustees Ltd. (United Kingdom) . . . . .	100
Albright & Wilson (Warley) Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Works Pension Trustees Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Dentifrice Phosphates Sdn. Bhd. (Malaysia) . . . . .	100
Albright, Morarji and Pandit Limited (India) . . . . .	39.9
Astoria Shipping & Transport Co., Ltd (United Kingdom) . . . . .	100
Cambray Ltd. (United Kingdom) . . . . .	100
Clifford Christopherson & Co., Ltd. (United Kingdom) . . . . .	100
Cumbria Trading Co., Ltd. (United Kingdom) . . . . .	100
Detergent Chemical Limited (United Kingdom) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Albright & Wilson Limited (continued)*

Electropol Ltd. (United Kingdom) . . . . .	100%
General Phosphates Co. Ltd. (United Kingdom) . . . . .	100
Leo Lines, Ltd. (United Kingdom) . . . . .	100
Mallison Feeds, Ltd. (United Kingdom) . . . . .	100
Marchon Products, Ltd. (United Kingdom) . . . . .	100
Mays Chemical Manure Co., Ltd. (United Kingdom) . . . . .	100
Mortimer Investment Co Limited (United Kingdom) . . . . .	100
Proban Ltd. (United Kingdom) . . . . .	100
Solway Chemicals, Ltd. (United Kingdom) . . . . .	100
Stockport United Chemical Co Ltd. (United Kingdom) . . . . .	100
Tenneco Malros Ltd. (United Kingdom) . . . . .	100
Tenneco Organics Ltd. (United Kingdom) . . . . .	100
Butler (1843) Ltd. (United Kingdom) . . . . .	50
(50% owned by Petrofina (U.K.) Limited a non-Tenneco company)	
Arndale Fuels Ltd. (United Kingdom) . . . . .	100
Butler Oil Produce Ltd. (United Kingdom) . . . . .	100
Croft Oils Limited (United Kingdom) . . . . .	100
Elston Oils Limited (United Kingdom) . . . . .	100
Gough Oils Limited (United Kingdom) . . . . .	100
John Oils Limited (United Kingdom) . . . . .	100
Compass Chemical Company, Ltd. (United Kingdom) . . . . .	100
The Scottish Chemical Co., Ltd. (United Kingdom) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Albright & Wilson Limited (continued)*

Thai Polyphosphate & Chemicals Co. Ltd. (Thailand) . . . . .	30%
Thomas Tyrer & Co. Ltd. (United Kingdom) . . . . .	100
Case-Poclain Limited (United Kingdom) . . . . .	100
David Brown Tractors Limited (United Kingdom) . . . . .	100
David Brown Tractors (Belfast Ltd. (United Kingdom) . . . . .	100
David Brown Tractors (Ireland) Ltd. (Ireland) . . . . .	100
David Brown Tractors (Retail) Ltd. (United Kingdom) . . . . .	100
A.M. Exports Limited (United Kingdom) . . . . .	100
Poclain Limited (United Kingdom) . . . . .	100
Tractorwork, Limited (United Kingdom) . . . . .	100
Harmo Industries, Ltd. (United Kingdom) . . . . .	100
Birmingham Filters Limited (United Kingdom) . . . . .	100
Brames Limited (United Kingdom) . . . . .	100
D. P. Miller & Sons Limited (United Kingdom) . . . . .	100
Harmo Pressings Limited (United Kingdom) . . . . .	100
Harmo Steel Co. Limited (United Kingdom) . . . . .	100
Harmo Tubes Limited (United Kingdom) . . . . .	100
F. Mould Limited (United Kingdom) . . . . .	100
F. Mould (Silencers) Limited (United Kingdom) . . . . .	100
J. W. Hartley (Motor Trade) Limited (United Kingdom) . . . . .	100
Fisher & Mould Limited (United Kingdom) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Harmo Industries, Ltd. (continued)*

Harmo Auto Services (Export) Limited (United Kingdom) . . . . .	100%
Harmo Auto Services Limited (United Kingdom) . . . . .	100
Harmo Export Ltd. (United Kingdom) . . . . .	100
Harmo Filters Limited (United Kingdom) . . . . .	100
Harmo Technical Development Limited (United Kingdom) . . . . .	100
Steering & Suspension Limited (United Kingdom) . . . . .	100
Karobes Limited (United Kingdom) . . . . .	100
Midland Trim & Equipment Ltd. (United Kingdom) . . . . .	100
The Harmo Engineering Co. Limited (United Kingdom) . . . . .	100
Houston Data Venture (U.K.) Limited (United Kingdom) . . . . .	100
J. I. Case Company Limited (United Kingdom) . . . . .	100
Monroe Auto Equipment U.K. Limited (United Kingdom) . . . . .	100
Tees Storage Company Limited (United Kingdom) . . . . .	50
Tenneco-Walker (U.K.) Limited (United Kingdom) . . . . .	100
Tenneco West Limited (United Kingdom) . . . . .	100
Tenneco United Kingdom, Inc. (Delaware) . . . . .	100
Tenneco Venezuela, Inc. (Delaware) . . . . .	100
Thompson and Stammers (Dunmow) Limited (United Kingdom) . . . . .	100
Universaltrac Beteiligungs GmbH (Germany) . . . . .	100
Interactor Viehmann GmbH & Co. (Germany) . . . . .	50
Intertractor A.G. (Switzerland) . . . . .	100
Intertractor America Corporation (Delaware) . . . . .	100
Intertractor G.B. Ltd. (United Kingdom) . . . . .	100
Intertractor Italiana S.R.L. (Italy) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Realty, Inc. (continued)*

Walker Europe, Inc. (Delaware) .....	100%
Walker Norge A/S (Norway) .....	100
Tenneco LNG Inc. (Delaware) .....	100
Tenneco Norway LNG Inc. (Delaware) .....	100
Tenneco Realty, Inc. (Delaware) .....	100
First National Services, Inc. (Delaware) .....	100
Immobiliaria Beigrado, S.A. (Mexico) .....	100
Ten Ten Travis Corporation (Delaware) .....	100
Tennchase, Inc. (Texas) .....	100
Tenneco Realty Development Corporation (Delaware) .....	100
Meadows of the Kern Mutual Water Company (California) .....	100
Stockdale Coffee Company (California) .....	100
Tenneco Arizona Property Corporation .....	100
Tenneco Property Corporation (California) ....	100
Tenneco Realty Development Holding Corporation (Delaware) .....	100
Uplands of the Kern Mutual Water Company (California) .....	100
Tennessee Gas Building Corporation (Delaware) ..	100
TRI Realty, Inc. (Texas) .....	100
Tenneco Shale Oil Company (Delaware) .....	100
Tenneco SNG Inc. (Delaware) .....	100
Tenneco Trinidad LNG, Inc. (Delaware) .....	100
Tenneco Ventures Inc. (Delaware) .....	100
Tennessee Gas Marketing Company (Delaware) ....	100
Tennessee Gas Services, Inc. (Delaware) .....	100
Tennessee Gas Transmission Company (Delaware) ...	100
Tennessee Iroquois Gas Company (Delaware) .....	100
Tennessee Niagara Gas Company (Delaware) .....	100
Tennessee Ozark Gas Company (Delaware) .....	100
Tennessee Storage Company (Delaware) .....	100
Tennessee Trailblazer Gas Company (Delaware) ....	100
Walker Manufacturing Company (Delaware) .....	100
Walker Marketing Corporation (Wisconsin) .....	100

**ASSOCIATED GAS DISTRIBUTORS**

AGD is an informal association of East Coast local natural gas distribution companies. The members of AGD and their parent companies, subsidiaries, and affiliates are listed as follows:

**Atlanta Gas Light Company\***

Subsidiaries: Georgia Gas Company  
Georgia Engine Sales & Service  
Trustees Investments, Inc.  
Georgia Natural Gas Company  
Georgia Gas Service Company  
George Energy Company

**Baltimore Gas & Electric Company\***

Subsidiaries: Constellation Holdings, Inc.  
Constellation Investments, Inc.  
Constellation Properties, Inc.  
Constellation Biogas, Inc.

Affiliate: Safe Harbor Water Power Corporation

**Bay State Gas Company\***

Subsidiaries: Bay State Exploration, Inc.  
Bay State Gas Supply, Inc.  
Northern Utilities, Inc.  
Granite State Gas Transmission, Inc.

**The Berkshire Gas Company\***

**Boston Gas Company**

Parent: Eastern Gas and Fuel Associates\*

**The Brooklyn Union Gas Company\***

Subsidiaries: Fuel Resources, Inc.  
Fuel Resources Gathering, Inc.  
Brooklyn Union Exploration  
Company, Inc.  
Gas Energy, Inc.  
Methane Development Corporation  
Collectaccount Services, Inc.  
Star Enterprises, Inc.  
Delaware Valley Propane Company

\*Denotes publicly owned member or parent company.

Central Hudson Gas & Electric Corporation\*

Subsidiaries: Central Hudson Enterprises Corp.  
Central Hudson Cogeneration, Inc.  
CH Resources, Inc.  
Greene Point Development Corp.  
Phoenix Development Co., Inc.

Chesapeake Utilities Corporation

Subsidiary Eastern Shore Natural Gas Co.  
Dover Exploration Co.  
Skipjack, Inc.  
Sharpgas, Inc.

City of Holyoke, Mass., Gas & Electric Department

City of Norwich, Department of Public Utilities

City of Westfield Gas & Electric Light Department

Colonial Gas Company\*

Subsidiaries: Transgas, Inc.  
Massachusetts Associates, Inc.

Commonwealth Gas Co.

Parent: Commonwealth Energy System\*

Concord Natural Gas Corporation

Subsidiary: Concord Gas Service Corp.

Consolidated Edison Company of New York, Inc.\*

Delmarva Power & Light Company\*

Subsidiaries: Delmarva Energy Company  
Delmarva Industries, Inc.  
Delmarva Capital Investments, Inc.  
DCI I, Inc.  
DCI II, Inc.

Elizabethtown Gas Company

Parent: NUI Corporation\*

---

\*Denotes publicly owned member or parent company.

EnergyNorth, Inc.\*

Subsidiaries: EnergyNorth Realty, Inc.  
Gas Service, Inc.  
Energy Resources Corp.  
Manchester Gas Co.  
Concord Natural Gas Corp.  
Concord Gas Service Corp.  
Rent-A-Space of New England, Inc.

Essex County Gas Company

Fitchburg Gas & Electric Light Company\*

Subsidiary: Fitchburg Energy Development Co.

Lynchburg Gas Company

Subsidiary: Lynco Development Corp.

New Jersey Natural Gas Company

Parent: New Jersey Resources Corporation\*

New York State Electric & Gas Corporation\*

Subsidiary: Somerset Railroad Corporation

North Carolina Natural Gas Corporation

Subsidiaries: NCNG Exploration Corp.  
Cape Fear Energy Corp.

Northeast Utilities\*

Subsidiaries: The Connecticut Light and Power  
Company  
Western Massachusetts Electric  
Company  
Holyoke Water Power Company  
Northeast Nuclear Energy Company  
The Rocky River Realty Company  
The Quinnehtuk Company  
Northeast Utilities Service Company

Northern Utilities, Inc. (see Bay State Gas Company)

Pennsylvania Gas & Water Company

Parent: Pennsylvania Enterprises, Inc.

---

\*Denotes publicly owned member or parent company.

Pequot Gas Co.

Philadelphia Electric Company\*

Subsidiaries: Adwin Equipment Company  
Adwin Realty Company  
Conowingo Power Company  
Eastern Pennsylvania Development  
Company  
Eastern Pennsylvania Exploration  
Company  
Philadelphia Electric Power Company  
The Susquehanna Electric Company  
The Susquehanna Power Company

Philadelphia Gas Works

Providence Gas Company

Parent: Providence Energy Corporation\*

Public Service Company of North Carolina, Inc.\*

Subsidiary: PSNC Natural Resources Corporation  
Tar Heel Energy Corp.  
PSNC Production Corp.  
PSNC Exploration Corp.  
PSNC Propane Corp.

Public Service Electric & Gas Company\*

Subsidiaries: Energy Pipeline Corporation  
Energy Terminal Services Corporation  
Mulberry Street Urban Renewal  
Corporation  
PSE&G Overseas Finance N.V.  
PSE&G Research Corporation  
Public Service Resources Corp.  
Community Energy Alternatives, Inc.  
Energy Development Corporation  
Gasdel Pipeline System, Inc.

South County Gas Co.

South Jersey Gas Co.

Parent: South Jersey Industries, Inc.\*

---

\*Denotes publicly owned member or parent company.

The Southern Connecticut Gas Co.

Parent: Connecticut Energy Corp.\*

UGI Corporation\*

Subsidiaries: AmeriGas, Inc.  
AP Propane  
AmeriGas II, Inc.  
Schwartz Carbonic Company  
Industrial Gases, Inc.  
Picar, Inc.  
AmeriLease, Inc.  
ANSUTECH, Inc.  
Matheson Gas Products, Inc.  
Matheson Gas Products  
Canada, Inc.

UGI Development Company

Ashtola Production Company  
International Petroleum Service  
Company

Keystone Oilfield Supply Co.  
Stimwell Services Company  
B&L Services, Inc.

Universal Well Services, Inc.  
Target Cementing Co.

UGID Holding Company  
Triad Drilling Company  
Union Supply Company  
Wellhead Compressor Packagers  
Company

---

\*Denotes publicly owned member or parent company.

UGI Corporation\* (continued)

Subsidiaries:

Wellhead Finance Co.

Cryotex, Inc.  
Heavy Media, Inc.  
Four Flags Drilling Company, Inc.  
Tri-Four, Inc.  
UGID Drilling Company  
UGID Drilling Investing Company  
UGI Ethanol Development Corporation  
SAM's Well Service, Inc.  
Development Leasing Corporation  
Physicians Technology Corporation  
Capital Housing, Inc.  
Skyten Corporation  
UGI Realty Company  
UGI Finance N.V.

Valley Gas Co.

Parent: Valley Resources, Inc.\*

Washington Gas Light Co.\*

Subsidiaries:

Crab Run Gas Co.  
Davenport Insulation, Incorporated  
Frederick Gas Co., Inc.  
Hampshire Gas Co.  
Shenandoah Gas Co.  
Brandywood Estates, Inc.  
Washington Gas Approved Services, Inc.  
Rock Creek Properties, Inc.  
Utilitrol

\*Denotes publicly owned member or parent company.

**Panhandle Eastern Pipe Line Company**

The following are subsidiaries or affiliates of Panhandle Eastern Pipe Line Company:

Aurora Industries, Inc.  
Dixilyn-Field Drilling Company  
Faskure Technology, Inc.  
Mantaray Pipeline Company  
Pan Eastern Exploration Company  
Panhandle Eastern Corporation  
Southwest Gas Storage Company  
Stingray Pipeline Company  
Trunkline Gas Company  
Trunkline LNG Company  
The Youghiogeny and Ohio Coal Company

**Consolidated Gas Transmission Corporation**

Consolidated Gas Transmission Corporation is a subsidiary of Consolidated Natural Gas Company. The other subsidiaries included in the Consolidated Natural Gas System are CNG Coal Company, CNG Development Company, CNG Energy Company, CNG Producing Company, CNG Research Company, CNG Trading Company, Consolidated System LNG Company, The East Ohio Gas Company, Hope Gas, Inc., The Peoples Natural Gas Company, The River Gas Company, West Ohio Gas Company and Consolidated Natural Gas Service Company, Inc.

Nos. 87-363 and 87-364

---

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Petitioner,*

v.

MARTIN EXPLORATION MANAGEMENT  
COMPANY, *et al.*,

*Respondents.*

PUBLIC SERVICE COMMISSION OF  
THE STATE OF NEW YORK, *et al.*

*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT  
COMPANY, *et al.*,

*Respondents.*

---

BRIEF IN OPPOSITION TO PETITIONS FOR A  
WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

[Counsel for Producer  
Respondents are listed  
inside]

October 30, 1987

AMOCO PRODUCTION COMPANY

WILLIAM T. BENHAM\*  
200 East Randolph Drive  
P. O. Box 5910-A  
Chicago, Illinois 60680  
(312) 876-7941

JOHN L. BRUNENKANT  
GROVE, JASKIEWICZ, GILLIAM  
& COBERT  
Suite 501  
1730 M Street, N.W.  
Washington, D.C. 20036  
(202) 296-2900

CITIES SERVICE OIL & GAS CORP.

MICHAEL L. PATE\*  
P. O. Box 300  
Tulsa, Oklahoma 74102  
(918) 561-4541

EXXON CORPORATION

C. ROGER HOFFMAN  
DOUGLAS W. RASCH\*  
P. O. Box 2180  
Houston, Texas 77001  
(713) 656-1691

INDEPENDENT OIL AND GAS  
ASSOCIATION OF WEST VIRGINIA

R. GORDON GOOCH\*  
TRAVIS AND GOOCH  
1101 15th St., N.W., Ste. 1200  
P. O. Box 65688  
Washington, D.C. 20035-5688  
(202) 457-5500

ARCO OIL AND GAS COMPANY

HARRIS S. WOOD\*  
P. O. Box 2819  
Dallas, Texas 75221  
(214) 880-4869

BHP PETROLEUM COMPANY INC.

WILLIAM S. MARTIN\*  
5051 Westheimer  
1300 Post Oak Tower  
Houston, Texas 77056  
(713) 780-5313

CHEVRON U.S.A., INC.

JAMES B. ATKIN\*  
DAVID J. EVANS  
PILLSBURY, MADISON & SUTRO  
1667 K St., N.W., Suite 1100  
Washington, D.C. 20006  
(202) 887-0300

GRACE PETROLEUM CORPORATION

CHARLES H. SHONEMAN\*  
BRACEWELL & PATTERSON  
2000 K St., N.W., Ste. 500  
Washington, D.C. 20006-1809  
(202) 828-5800

MARTIN EXPLORATION MANAGEMENT  
COMPANY  
COLORADO ENERGY CORPORATION

STEPHEN A. HERMAN, P.C.\*  
JAMES D. SENDER  
KIRLAND & ELLIS  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 879-5016

OHIO OIL AND GAS ASSOCIATION

M. HOWARD PETRICOFF\*  
W. JOHNATHAN AIREY  
VORYS, SATER, SEYMOUR AND  
PEACE  
52 East Gay St.  
Columbus, Ohio 43215  
(614) 464-5414

PHILLIPS PETROLEUM COMPANY

JOHN L. WILLIFORD  
CHARLES L. PAIN\*  
JENNIFER A. CATES  
1258 Adams Building  
Bartlesville, Oklahoma 74004  
(918) 661-6355

PLACID OIL COMPANY

RONALD D. HURST\*  
PAUL W. HICKS  
3900 Thanksgiving Tower  
Dallas, Texas 75201  
(214) 880-1000

UNION OIL COMPANY OF  
CALIFORNIA

KENNETH L. RIEDMAN\*  
Room 907  
P. O. Box 7600  
Los Angeles, CA 90051  
(213) 977-7768

PENNZOIL COMPANY

JOHN B. CHAPMAN\*  
KATHELENE E. MAGRUDER  
PENNZOIL PLACE  
700 Milam Street  
Houston, Texas 77002  
(713) 546-8859

JOHN McDONALD  
RICHARD E. POWERS, JR.  
BUTLER & BINION  
1747 Pennsylvania Ave., N.W.  
Washington, D.C. 20005  
(202) 466-6900

SHELL OFFSHORE, INC.  
SHELL WESTERN E&P, INC.

THOMAS G. JOHNSON\*  
One Shell Plaza  
Houston, Texas 77001  
(713) 241-4742

UNION PACIFIC RESOURCES  
COMPANY

CONSTANCE D. COLEMAN\*  
801 Cherry Street  
P. O. Box 7, MS 4010  
Fort Worth, Texas 76101-0007  
(817) 877-7540

\* *Counsel of Record*

### QUESTION PRESENTED

Whether a regulation adopted by the Federal Energy Regulatory Commission is valid under the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* ("NGPA"), where the regulation provides that natural gas qualifying for an incentive price regulated category under the NGPA is not subject to such incentive regulated prices and cannot be treated as falling in the regulated category if it also qualifies in any category eligible for price deregulation?

### LIST OF PARTIES

The producer respondents ("Producers") joining in this Brief in Opposition are as follows:

Martin Exploration Management Company  
Amoco Production Company  
Arco Oil and Gas Company  
BHP Petroleum Company Inc.  
Chevron U.S.A., Inc.  
Cities Service Oil and Gas Corp.  
Exxon Corporation  
Grace Petroleum Corporation  
Independent Oil and Gas Association of West Virginia  
Ohio Oil and Gas Association  
Pennzoil Company  
Phillips Petroleum Company

Placid Oil Company

Shell Offshore, Inc.

Shell Western E&P, Inc.

Union Oil Company of California

Union Pacific Resources Company

Pursuant to Rule 28.1, we include as an addendum hereto a listing naming all parent companies and non-wholly-owned subsidiaries and affiliates of the corporate respondents joining in this brief.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
LIST OF PARTIES .....	i
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	1
JURISDICTION .....	1
STATUTES AND REGULATIONS INVOLVED .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	6
REASONS FOR DENYING THE WRIT .....	7
Introduction .....	7
Statutory Language .....	8
"Exemption" Refers to Decontrolled Categories .....	8
"Could" Refers to Real World Prices .....	10
Section 121 Does Not Nullify Section 101(b)(5) .....	13
Category Selection .....	16
Impact .....	17
CONCLUSION .....	19
ADDENDUM .....	1a

## TABLE OF AUTHORITIES

CASES:	Page
<i>Federal Reserve System v. Dimension Financial Corp.</i> , 474 U.S. 361 (1986) .....	13,19
<i>Oklahoma v. FERC</i> , 661 F.2d 832 (10th Cir. 1981), cert. denied, 457 U.S. 1105 (1982) .....	11
<i>Penzoil Co. v. FERC</i> , 645 F.2d 360 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982) .....	11,12
<i>Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co.</i> , 463 U.S. 319 (1983) .....	2,11,14
STATUTES AND REGULATIONS:	
Administrative Procedure Act, 5 U.S.C.	
§ 706(2)(c) .....	13
Natural Gas Policy Act of 1978, 15 U.S.C.	
§ 3301 et seq. (1982)	
§ 2(3), 15 U.S.C. § 3301(3) .....	4
§ 101(b)(5), 15 U.S.C. § 3311(b)(5) .....	1,6,8
§ 105(b)(3), 15 U.S.C. § 3315(b)(3) .....	16
§ 121, 15 U.S.C. § 3331 .....	3
§ 121(a), 15 U.S.C. § 3331(a) .....	3
§ 501(a), (b); 15 U.S.C. § 3411(a), (b) .....	13
26 U.S.C.	
§ 29(a) .....	18
§ 29(c) .....	18
§ 29(e) .....	18
§ 29(c)(2)(B) .....	18
18 C.F.R.	
§ 270.208 .....	2
§ 271.101 .....	5
§ 271.703(a) .....	5

## Table of Authorities Continued

	Page
§§ 271.801-807 .....	5
ADMINISTRATIVE MATERIALS:	
H.R. Rep. No. 1752, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. and Admin. News 8983 .....	9,14
124 Cong. Rec. S15,021 (daily ed. Sept. 13, 1978) (statement of Sen. Jackson) .....	10,17
124 Cong. Rec. H13,116 (daily ed. Oct. 14, 1978) (statement of Rep. Dingell) .....	17
FERC RULINGS:	
Interim Rule Covering High Cost Natural Gas Produced From Tight Formations, 45 Fed. Reg. 13,414, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,130 (February 28, 1980) .....	5,9,15
Notice of Proposed Rulemaking, Docket No. RM84-14-000, 49 Fed. Reg. 36,399 (September 13, 1984) .....	4
Order No. 99, 45 Fed. Reg. 56,034, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,183 (August 22, 1980) .....	5
Order No. 406, FERC Stats. & Regs. (Regs. Preambles 1982-85) (CCH) ¶ 30,614 (November 16, 1984) .....	4
Order No. 406-A, FERC Stats. & Regs. (Regs. Preambles 1982-85) (CCH) ¶ 30,622 (December 21, 1984) .....	5
Order No. 406-B, 30 FERC (CCH) ¶ 61,152 (February 15, 1985) .....	17
MISCELLANEOUS:	
Rev. Rul 86-127, 1986-2 C.B.4 (1986) .....	18
Webster's New International Dictionary, unabridged (2d ed. 1954) .....	10

### OPINIONS BELOW

Petitioners seek review of the decision of the U.S. Court of Appeals for the Tenth Circuit in *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059 (10th Cir. 1987) ("*Martin*"). The Court of Appeals affirmed in part and reversed in part Federal Energy Regulatory Commission ("Commission") Order No. 406 issued in FERC Docket Nos. RM84-14-000 et al., FERC Stats. & Regs. (Regs. Preambles 1982-85) (CCH) ¶ 30,614 (November 16, 1984) and Order No. 406-A on rehearing, FERC Stats. & Regs. (Regs. Preambles 1982-85) (CCH) ¶ 30,622 (December 21, 1984). Order No. 406-B, denying rehearing of Order No. 406-A, 30 FERC (CCH) ¶ 61,152 (February 15, 1985), is not pertinent to the issues raised in the petitions.

### JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

### STATUTES AND REGULATIONS INVOLVED

Section 101(b)(5) of the NGPA, 15 U.S.C. § 3311(b)(5), provides:

(b) *Rules of General Application.*— . . . .

. . . .

(5) *Sales qualifying under more than one provision.*—If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas,

the provision which could result in the highest price shall be applicable.

Title 18 C.F.R. § 270.208 adopted in Commission Order No. 406 provides:

First sales of natural gas that is deregulated natural gas as defined in § 272.103(a) is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

This case also involves Sections 107(c)(5), 108 and 121 of the NGPA, 15 U.S.C. §§ 3317(c)(5), 3318 and 3331 (see Commission Pet. App. at 127a-131a).<sup>1</sup>

#### STATEMENT OF THE CASE

*Partial Decontrol Under NGPA Section 121.* The NGPA, 15 U.S.C. §§ 3301-3432, was enacted by Congress on November 9, 1978. The NGPA was carefully negotiated compromise legislation enacted only after long debate and discussion between representatives of producing and consuming states. The NGPA was intended to bring about a solution to what had become chronic shortages of natural gas in interstate commerce. Under the NGPA compromise, Congress provided a statutory means for setting of maximum lawful prices for gas in a number of different categories. See generally *Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 325-

<sup>1</sup> App. refers to the Appendices to the Commission's Petition filed in No. 87-363 on August 31, 1987.

38 (1983) ("*Mid-Louisiana*"). Natural gas sold in intrastate commerce was brought under price controls for the first time as of the NGPA's effective date, December 1, 1978. Section 121 of the NGPA, 15 U.S.C. §3331, provided for price decontrol of certain categories of gas on differing dates. Section 121(a) of the NGPA removed price controls as of January 1, 1985, for the following categories of natural gas:

- (1) New natural gas as defined in Section 102(c) of the NGPA.
- (2) Natural gas produced from new onshore production wells as defined in Section 103(c) of the NGPA if that gas was not committed or dedicated to interstate commerce on April 20, 1977, and is produced from a completion location located at a depth of more than 5,000 feet.
- (3) Natural gas sold under an existing contract, any successor to an existing contract or any rollover contract if (a) the gas was not committed or dedicated to interstate commerce on November 8, 1978, and (b) the price paid or payable on December 31, 1984, was higher than \$1.00 per million Btu's.

15 U.S.C. § 3331(a). Other categories of gas remain subject to price controls indefinitely.

*Notice of Proposed Rulemaking.* Anticipating the January 1, 1985, partial decontrol of certain intrastate gas and gas produced from a large portion of the "new wells" commenced on or after February 19,

1977,<sup>2</sup> the Commission issued a Notice of Proposed Rulemaking in Docket No. RM84-14-000 on September 13, 1984, 49 Fed. Reg. 36,399, App. 34a-60a. The Commission proposed rules designed to implement NGPA Section 121(a) and to provide for price decontrol of the categories of gas scheduled to be decontrolled as of January 1, 1985. In the Notice the Commission first announced its tentative conclusion that where gas qualifies in an incentive price category and also qualifies for deregulation, where the regulated price may be higher than the deregulated price, the regulated prices would no longer apply. App. 43a-45a.

*Order No. 406.* On November 16, 1984, Order No. 406 was issued (App. 61a-103a). The Commission concluded that gas that qualifies in a still-regulated incentive price category must be decontrolled if such gas also qualifies in a decontrolled category (App. 73a-82a). The Commission denied producer claims of reliance upon the incentive prices in the higher still-regulated price categories despite numerous contradicted statements in comments and at the hearing of such reliance. (App. 79a-81a).

The primary categories which are still regulated and which might afford higher prices to producers than deregulated treatment are NGPA Sections 107(c)(5) and 108, 15 U.S.C. §§ 3317(c)(5) and 3318. Section 107(c)(5) allows the Commission to establish incentive prices for high cost gas produced under con-

<sup>2</sup> "New well" is defined in NGPA § 2(3), 15 U.S.C. § 3301(3), as a well whose surface drilling began on or after February 19, 1977, or which was deepened by at least 1,000 feet after that date.

ditions that the Commission determines present extraordinary risks or costs. The Commission has determined that gas produced from designated tight formations subject to a "negotiated contract price" may be priced at up to two hundred percent of the maximum lawful price specified for NGPA § 103(b)(1) gas.<sup>3</sup> Stripper well gas qualifying under Section 108 is gas produced from low volume wells which are frequently in the later stages of depletion, which would be abandoned prematurely leaving producible gas in the reservoir without the incentive price made available by Congress. The stripper well price is higher than the NGPA Section 102 new gas price and is designed to provide incentives for the fullest possible recovery of producible reserves. See 18 C.F.R. §§ 271.101, 271.703(a) and 271.801-271.807. The Commission decided that a new tight formation gas category determination also is necessarily a Section 102(c) or 103 determination, even if the producer never sought a determination that the gas in question qualified in Sections 102 or 103 (App. 81a-82a).<sup>4</sup>

*Order No. 406-A.* As to the issue raised in the current petitions, on rehearing the Commission reaffirmed the position stated in Order No. 406 (App.

<sup>3</sup> Interim Rule Covering High-Cost Natural Gas Produced From Tight Formations, 45 Fed. Reg. 13,414, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,130 (February 28, 1980) ("Interim Rule"); Order No. 99, 45 Fed. Reg. 56,034, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,183 (August 22, 1980).

<sup>4</sup> We do not discuss the second question raised in the Commission's petition. The Commission does not argue that standing alone it would warrant review. (Comm. Pet. at 13 n.19)

107a-116a). The new regulations were effective January 1, 1985.

Producers sought judicial review, and the Court of Appeals issued the *Martin* opinion now sought to be reviewed (App. 1a-31a).

#### SUMMARY OF ARGUMENT

This is a case of statutory construction. Section 101(b)(5), 15 U.S.C. §3311(b)(5), of the NGPA is the rule of construction to be applied when more than one provision of Title I applies. That section provides that:

(b) *Rules of General Application.*— . . . .

. . . .

(5) *Sales Qualifying Under More than One Provision.*—If any gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Thus, the language of the NGPA is clear and unambiguous. If the gas is exempted under Section 121 of Subtitle B from the application of a maximum lawful price (i.e., deregulates) and remains qualified for a regulated maximum lawful price under another provision of Title I, the statute permits collection of the highest price for which the gas is eligible.

The Commission and its supporters seek to have the Court disregard the plain language of Section

101(b)(5). Where Congress has spoken on an issue, its pronouncement is mandatory as the controlling law. Statutes are to be construed in a manner most consistent with common understanding. Instead, petitioners engage in sophistry in order to arrive at a preconceived result plainly inconsistent with Congressional intent. The Commission's construction is at odds with the language, legislative history and Congress' intent in adopting the NGPA.

This case presents a narrow statutory construction issue of limited and ever-declining applicability. Dual category gas constitutes an unquantified but very small percentage of the nation's natural gas supplies. Dual category gas covered by commitments to purchase at ceiling prices is a much smaller volume. None of the traditional grounds for granting certiorari are present here. The Court's attention is simply not warranted.

The decision of the U.S. Court of Appeals for the Tenth Circuit thoroughly and correctly analyzed the issues and invalidated Section 270.208 of the Commission's regulations as inconsistent with Section 101(b)(5) of the NGPA. The writs sought in these cases should be denied.

#### REASONS FOR DENYING THE WRIT

*Introduction.* In this case the Commission has sought to manufacture ambiguity where none exists in a very specific controlling statutory command. Generally, we refer the Court to the Tenth Circuit's *Martin* opinion for its cogent treatment of the arguments advanced by the Commission. A review of the *Martin* opinion leads to the conclusion that Section 270.208 of the Commission's regulations cannot stand. Con-

gress spoke directly on the issue of regulatory treatment under the NGPA for gas falling into multiple price categories, specifically including the situation that prevails when one of the multiple price categories is eligible for price decontrol. Section 101(b)(5) states that the price category that will result in the highest price applies. This result is consistent with Congress' expressly stated intent, the legislative history of the NGPA and Congress' overall objective of providing continuing incentives for production of high cost Section 107(c)(5) gas and Section 108 gas in the later stages of depletion even during and after a transition to a field market controlled more by market forces than by regulation. In contrast, the Commission's result can withstand neither plain meaning analysis nor a review for reasonableness.

*Statutory language.* Turning first to the statutory language, Section 101(b)(5) seems clear on its face that if gas qualifies under multiple price categories whether regulated or deregulated, "the provision which could result in the highest price shall be applicable." But rather than look at Section 101(b)(5), the other general rules of application in Section 101(b) and Section 121 of the NGPA as a consistent whole, the Commission either ignores or seeks to alter this controlling subsection in an effort to obtain the result that regulated incentive prices may no longer be collected under applicable maximum lawful price or similar clauses.

*"Exemption" Refers to Decontrolled Categories.* The first issue involves the meaning of "exemption from such a price." As used, this is a very clear reference to deregulated categories, since it immediately follows "any maximum lawful price" and is parallel with a

similar "exemption" reference in Section 101(b)(9) of the NGPA (App. 13a-15a).<sup>5</sup> Thus the language of NGPA Section 101(b)(5) is clear and prohibits adoption of any rule mandating involuntary deregulation for incentive price regulated gas. The rule was accurately described in the primary source of legislative history for the NGPA, the Conference Report:

The conference agreement provides that if natural gas qualifies under more than one price category, the provisions that permit the seller to obtain the highest price applies.<sup>6</sup>

Moreover, in one of its own prior proceedings the Commission itself found that "[u]nder Section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible including a deregulated price, if applicable."<sup>7</sup>

<sup>5</sup> Petitioners in both cases appear to have abandoned any contention that "exemption" does not refer to deregulated categories.

<sup>6</sup> H.R. Rep. No. 1752, 95th Cong., 2d Sess. 74, reprinted in 1978 U.S. Code Cong. & Admin. News 8983, 8991 (emphasis added) ("Conference Report").

<sup>7</sup> Interim Rule, 45 Fed. Reg. at 13,422-23.

New York, et al. also suggest (Pet. at 11) that the Commission construction is entitled to deference on the ground that it is a contemporaneous construction of the statute. The statement is incorrect. The current Commission interpretation wasn't even invented until 1984 and was first disclosed in the notice of proposed rulemaking in this case. See letter from Commission Chairman Curtis to Senator Jackson forwarding the Commission's Section by Section Analysis and the Analysis, mimeo at 22, (Sept. 8, 1978) for a differing contemporaneous interpretation, reprinted in Natural Gas Policy Act Information Service

*"Could" Refers to Real World Prices.* Initially, the Commission focuses on "could" in the phrase in Section 101(b)(5) "the provision which *could* result in the highest price shall be applicable." This argument seeks to transform the meaning of "could" from "was, should be or would be able"<sup>8</sup> to the realm of theoretical possibilities. Since a deregulated price could in theory be infinitely high, that option must always control, says the Commission. The Court of Appeals dealt effectively with the position, finding that reference to the real world is necessary (App. 15a-16a). The Court of Appeals correctly found that the "could" theory of the Commission would render meaningless a statutory provision that deals with two possibilities by forever negating one of those possibilities. The result is plainly inconsistent with this Court's own prior comments in *Mid-Louisiana* concerning Section 101(b)(5):

The statute evinces careful thought about the extent to which producers of "old gas"—gas already dedicated to interstate commerce before passage of the NGPA—would be able to enjoy incentive pricing . . . . However, § 101(b)(5) of the Act specifies that if a volume of gas fits into more than one category, "the provision which could result in the highest price shall be applicable." Thus, old gas that would be subject to the old NGA vintaging rules may be entitled to a higher rate if it falls within one or more of the

(FPAS) ¶ 101:220, at 2. Compare Statement of Senator Jackson, *id.* ¶ 101:230, at 1, 124 Cong. Rec. S15020-21 (daily ed. Sept. 12, 1978).

<sup>8</sup> Webster's New International Dictionary, unabridged (2d ed. 1954).

other Title I categories, in particular §107 (high-cost natural gas) and §108 (stripper well gas). Whether or not the old NGA rates were in fact sufficient to stimulate some production from those categories, Congress concluded that the nation's energy needs justified the higher, statutory rates.<sup>9</sup>

The Court of Appeals also cited a number of other decisions reading Section 101(b)(5) in a common sense manner contrary to the Commission's analysis of "could".<sup>10</sup> The use of that term in Section 101(b)(5) designates as the applicable price category the category that actually results in the highest prices payable to the producer or first seller.

Congress would not have seized upon a subtlety so obscure as the Commission's current interpretation of "could" had it intended that deregulated treatment must always apply to dual category gas eligible for decontrol. The NGPA was "the product of a conference committee's careful reconciliation" of "two strong, but divergent, responses to the natural gas shortage" *Mid-Louisiana*, 463 U.S. at 331, a compromise that "took into account the conflicting interests of producers and consumers." *Pennzoil Co. v. FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) ("Pennzoil"). The NGPA was "Congress' solution to the necessity of encouraging production and exploration of new natural gas sources and maintaining adequate supplies of natural gas in the interstate market." *Oklahoma v. FERC*, 661 F.2d 832, 834 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). The closely negotiated NGPA compromise

<sup>9</sup> 463 U.S. at 334-35 (note omitted).

<sup>10</sup> App. 12a-13a n.8.

came about only after 18 months of legislative battles. It contains many provisions favorable to the interests of consuming states, which are balanced by other provisions favoring producing producing states.

Large areas of detail were withdrawn from the Commission's discretion in favor of closely negotiated specific rules expressed in as clear language as could be written. It is not surprising, therefore, that Congress foresaw the very issue now under review. Congress never would have drafted Section 101(b)(5) as it did to provide that the higher of two potentially applicable provisions will apply if only one of the two provisions could possibly apply. One simply does not draft a statute providing for "the higher of A or B" if B is always higher. If that were the intent, Congress simply would have stated that the Section 101(b)(5) rule would apply only as between multiple regulated categories and prior to deregulation. Very specific terms mandating only decontrolled treatment for gas eligible for decontrol would have been used. No such qualifications were adopted in Section 101(b)(5), Section 121 or elsewhere.

The Commission next argues that the Court of Appeals' reading of Section 101(b)(5) would entangle the Commission in contract construction, an anomaly in a statute otherwise concerned only with ceiling prices (Comm. Pet. at 15-6). This is a straw-man argument. The *Martin* court does not construe the statute to require constant reference to contract provisions. Indeed, the Commission lacks jurisdiction over many such contract disputes, *Pennzoil*, 645 F.2d at 380-82. Section 101(b)(5) quite simply gives the producer the benefit of the highest of all potentially

applicable maximum lawful price and decontrolled categories. There is no "glaring anomaly".

*Section 121 Does Not Nullify Section 101(b)(5).* The Commission and supporting parties argue that "deregulation is mandatory" and that the Court of Appeals' result is inconsistent with an overall single objective of the NGPA to move toward a deregulated field market (Comm. Pet. at 16-8, New York Pet. at 7). There are a number of answers to these contentions (App. 11a, 13a n.9). First, general arguments about overall objectives cannot override contrary statutory language.<sup>11</sup> Second, the Commission's argument recognizes, as it must, that the NGPA was compromise legislation embodying a mix of conflicting objectives. While a less regulated field market was an important eventual objective, so was the immediate equalization of access to field markets by both interstate and intrastate purchasers. Supply elicitation was another primary and continuing objective of the NGPA. Continued incentive pricing for Section 107(c)(5) high-cost gas and Section 108 stripper gas was plainly another of Congress' supply eliciting objectives.

Third, the argument that "deregulation is mandatory" simply begs the question. There is no dispute that gas eligible for decontrol is in fact eligible for decontrol. Yet gas which is eligible for continued incentive prices is with equal force still eligible for those

<sup>11</sup> *Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986) ("Federal Reserve System"). Nor can general rulemaking authority do so. The Commission argues the contrary (Comm. Pet. at 18 n.21). NGPA rules must be consistent with the statute. NGPA Sections 501(a) and (b), 15 U.S.C. §§ 3411(a) and (b); 5 U.S.C. § 706(2)(C).

price incentives under the NGPA if that treatment results in a higher price. Section 121 speaks only of decontrol of named *categories* of gas.<sup>12</sup> The Commission's interpretation is unreasonable in any event in light of the Conference Report at 92: "The conference agreement does not provide for deregulation of any natural gas production not specifically enumerated in this section."<sup>13</sup>

Fourth, the argument that the Court of Appeals' result could cause frequent switches from regulated to deregulated category treatment is both factually erroneous and beside the point. Producers committed large investments to drill, fracture and equip wells producing high cost tight formation gas and to maintain or enhance production from stripper wells in reliance on continued availability of the NGPA price incentives in these categories. Producers have been unable to negotiate new contracts in the market at the NGPA incentive category price ceilings since early to mid-1983. The relatively few producers able to benefit from regulated treatment through older contracts with ceiling price clauses covering still-regulated incentive category gas will not be making frequent switches between deregulated and regulated treatment in the current and foreseeable energy markets. Contrary to the Commission's suggestion, this is not an ever-growing problem. Gas is being depleted as it is produced each day. Contracts are being renegotiated daily. Estimates of the cost of the Court of Appeals' decision are substantially overstated by petitioners.

<sup>12</sup> Mid-Louisiana, 463 U.S. at 336 n.14.

<sup>13</sup> 1978 U.S. Code Cong. and Admin. News at 9009.

New York, et al. persist in the argument that Section 101(b)(5) of the NGPA is not applicable, arguing that Section 121 makes *all* of subtitle A of Title I of the NGPA inapplicable to deregulated gas (New York Pet. at 8-9). The Commission itself expressly "does not renew" this argument (Comm. Pet. at 13 n. 19). The Court of Appeals properly rejected it (App. 10a-16a). This construction would render not only Section 101(b)(5) but other "rules of general application" meaningless. It would negate applicability of Section 101(b)(5) to deregulated gas even though Section 101(b)(5) expressly refers to deregulated gas. Section 101(b)(5) definitely applies to dual category gas at least in its capacity as regulated gas. Finally, not even the language of Section 121 supports the argument. Only the provisions of subtitle A "*respecting the maximum lawful price* for the first sale of each of the following categories" are made inapplicable, not all of subtitle A. In Section 121, Congress intended to eliminate only price controls for the named categories; it did not intend or state that other rules of general application are repealed.<sup>14</sup>

*Category Selection.* The Commission argues that the statute denies the producer any choice about applicable price categories and dictates that the *only* ap-

<sup>14</sup> The Commission (Comm. Pet. at 13 n.19) and New York (Comm Pet. at 6 n.3) repeat a claim from Order No. 406 that Producers have changed their tune regarding Section (101)(b)(5). The Pennzoil Co. comments quoted at App. 74a n.10 assert only that deregulated treatment for a Section 102 well which also qualifies as a tight formation well is an available option which cannot be denied by the Commission (R. 3179-84). The issue was resolved in a similar manner in the Tight Formations Gas Interim Rule, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,130 at 30,917 (1980).

plicable category is the category which "could result in the highest price." (Comm. Pet. at 18-21). This argument is but a variant of the "could" sophistry. The Commission now concedes that it is referring only to situations where natural gas has actually been qualified in both a still-regulated incentive price category and in a category eligible for decontrol, and repeats in different words its argument that in theory, deregulated prices must always control because they "could" be higher. The statute plainly and simply assures producers that when multiple categories could apply, the one that will result in the highest price does apply. Contrary to the Commission's straw-man argument (Comm. Pet. at 19-20), this construction imposes absolutely no burden on the agency to require the filing of reports and contracts in order to identify applicable categories. The Commission's historic policy of enforcement of NGPA prices by audits and actions on complaints is fully adequate. Compliance assessments will simply be based on the most favorable category from time to time. Producers are best equipped to determine in practice which category results in the highest price and is therefore applicable.<sup>15</sup>

<sup>15</sup> The Commission's attempt to distinguish the statement at page 83 of the Conference Report that stripper gas could be sold "subject to the provisions of Section 108 rather than taking deregulated treatment" (Comm. Pet. at 21 n.24) is not distinguishable on the basis cited by the Commission. Section 121(e) of the NGPA refers not to an overlap of two regulated categories, but to the relationship between Section 108 pricing and the operation of NGPA Section 105(b)(3), 15 U.S.C. § 3315(b)(3). The latter is *not* a separate regulated price category, but a post-decontrol limitation on the operation of indefinite price escalator clauses in certain intrastate contracts for the sale of deregulated gas. Congress intended that Section 108 prices may be collected

Finally, as the court found, the legislative history clearly supports producer choice in the matter of price categories (App. 19a).

The Commission suggests that since most assumed energy prices would exceed inflation rather than vice versa, Congress gave no consideration to the result that has ensued—the highest price is an incentive regulated price (Comm. Pet. at 20-21). This argument attempts to override clear statutory language with legislative history. The attempt fails; the fact that most assumed deregulated prices would be higher illuminates the legislative history and confirms the Court of Appeals' result. The legislators were simply saying that Section 101(b)(5) allows producers to obtain the highest price under any applicable category.<sup>16</sup>

*Impact.* Finally, the Commission and its supporters argue that the *Martin* opinion may increase consumer's natural gas costs in the 1985-1987 period by approximately \$300 million, or about \$100 million per year. It is alleged that pipelines and their customers cannot bear such costs. To the contrary, the financial impact of the *Martin* opinion is minimal. Where financial impacts occur, they result solely from Congressionally intended incentive prices and pipelines' own voluntary promises to pay those prices.

notwithstanding that limitation, as the Commission acknowledged in Order No. 406-B, 30 FERC (CCH) ¶ 61,152 at 61,323, R. 3388-9 (February 15, 1985).

<sup>16</sup> "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. H13,116 (daily ed. Oct. 14, 1978) (statement of Rep. Dingell); "[T]his provision stands for the proposition that a producer may claim or apply for the highest price to which he is entitled." 124 Cong. Rec. S15,021 (daily ed. Sept. 13, 1978) (statement of Sen. Jackson).

The \$100 million per year estimate was not made on the record by the Commission. Instead it is drawn from an extra-record letter from counsel for the Interstate Natural Gas Association of America to the Commission which urged the Commission to seek certiorari in this case. The estimate is the supposed result of a hasty study by highly interested parties who used unknown but clearly favorable assumptions and premises in performing the "study". Counsel for INGAA was requested to provide a copy of the "study" to Producer counsel, but did not do so. No credence should be given to such extra-record estimates. Even if we assume that producer revenues may increase by upwards of \$100 million per year as a result of vacation of the Commission's rule, that amount is on the order of 0.16% of consumers' total annual gas expenditures.<sup>17</sup>

### CONCLUSION

The Commission's effort in this case to deny producers the right to incentive price regulated category treatment is reminiscent of its effort to deny NGPA

---

<sup>17</sup> Energy Information Administration *Natural Gas Monthly*, Tables 3 and 4 (April 1987). 1986 total consumption of 14.581 Tcf times an overall average price per Mcf of \$4.26 equals \$62.115 billion. \$100 million is about 0.16% of this annual cost.

In fact, the Commission's effort to deny producers regulated incentive prices is counterproductive. Many producers of tight formation gas desire to sell those gas supplies at prices below the regulated incentive prices in order to gain a tax credit under Internal Revenue Code § 29. See 26 U.S.C. §§ 29(a), (c) and (e). The tax credit is applicable only to *regulated* tight formation gas. 26 U.S.C. §29(c)(2)(B). But the Internal Revenue Service has denied tax credit treatment for this gas based on Order No. 406. Rev. Rul 86-127, 1986-2 C.B.4 (1986).

pricing treatment to pipeline production in *Mid-Louisiana*. In that case, the Court reviewed the structure of Title I of the NGPA in detail and concluded that the Commission's interpretation of the "first sale" definition of the statute was inconsistent with its plain terms. Here, the issue is considerably less difficult; the statute's meaning is clear. Where Congress has spoken on a particular matter, its will is the law and must be given effect. An agency may not "correct flaws that it perceives in the statute . . . . Its rule-making power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Federal Reserve System*, 474 U.S. 361, 106 S. Ct. 681 at 689. The Court's inquiry must therefore "come to rest with the conclusion that the action of [the agency] is inconsistent with the language of the statute." *Id.*

The narrow statutory construction issue involved is of limited applicability which decreases every day as gas depletion of wells subject to older contracts continues. No conflict among the circuits exists or is likely.

The writs should be denied.

Respectfully submitted,

JOHN L. WILLIFORD  
CHARLES L. PAIN\*  
JENNIFER A. CATES  
Attorneys for  
PHILLIPS PETROLEUM COMPANY

CHARLES L. PAIN  
1258 Adams Building  
Bartlesville, OK 74004  
(918) 661-6355

# AND ON BEHALF OF:

## AMOCO PRODUCTION COMPANY

WILLIAM T. BENHAM\*  
200 East Randolph Drive  
P. O. Box 5910-A  
Chicago, Illinois 60680  
(312) 876-7941

JOHN L. BRUNENKANT  
GROVE, JASKIEWICZ, GILLIAM  
& COBERT  
Suite 501  
1730 M Street, N.W.  
Washington, D.C. 20036  
(202) 296-2900

## CITIES SERVICE OIL & GAS CORP.

MICHAEL L. PATE\*  
P. O. Box 300  
Tulsa, Oklahoma 74102  
(918) 561-4541

## ARCO OIL AND GAS COMPANY

HARRIS S. WOOD\*  
P. O. Box 2819  
Dallas, Texas 75221  
(214) 880-4869

## BHP PETROLEUM COMPANY INC.

WILLIAM S. MARTIN\*  
5051 Westheimer  
1300 Post Oak Tower  
Houston, Texas 77056  
(713) 780-5313

## CHEVRON U.S.A., INC.

JAMES B. ATKIN\*  
DAVID J. EVANS  
PILLSBURY, MADISON & SUTRO  
1667 K St., N.W., Suite 1100  
Washington, D.C. 20006  
(202) 887-0300

## EXXON CORPORATION

C. ROGER HOFFMAN  
DOUGLAS W. RASCH\*  
P. O. Box 2180  
Houston, Texas 77001  
(713) 656-1691

## INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA

R. GORDON GOOCH\*  
TRAVIS AND GOOCH  
1101 15th St., N.W., Ste. 1200  
P. O. Box 65688  
Washington, D.C. 20035-5688  
(202) 457-5500

## OHIO OIL AND GAS ASSOCIATION

M. HOWARD PETRICOFF\*  
W. JOHNATHAN AIREY  
VORYS, SATER, SEYMOUR AND  
PEACE  
52 East Gay St.  
Columbus, Ohio 43215  
(614) 464-5414

JOHN McDONALD  
RICHARD E. POWERS, JR.  
BUTLER & BINION  
1747 Pennsylvania Ave., N.W.  
Washington, D.C. 20005  
(202) 466-6900

## GRACE PETROLEUM CORPORATION

CHARLES H. SHONEMAN\*  
BRACEWELL & PATTERSON  
2000 K St., N.W., Ste. 500  
Washington, D.C. 20006-1809  
(202) 828-5800

## MARTIN EXPLORATION MANAGEMENT COMPANY COLORADO ENERGY CORPORATION

STEPHEN A. HERMAN, P.C.\*  
JAMES D. SINGER  
KIRLAND & ELLIS  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 879-5016

## PENNZOIL COMPANY

JOHN B. CHAPMAN\*  
KATHELENE E. MAGRUDER  
PENNZOIL PLACE  
700 Milam Street  
Houston, Texas 77002  
(713) 546-8859

## PLACID OIL COMPANY

RONALD D. HURST\*  
PAUL W. HICKS  
3900 Thanksgiving Tower  
Dallas, Texas 75201  
(214) 880-1000

UNION OIL COMPANY OF  
CALIFORNIA

KENNETH L. RIEDMAN\*  
Room 907  
P. O. Box 7600  
Los Angeles, CA 90051  
(213) 977-7768

SHELL OFFSHORE, INC.  
SHELL WESTERN E&P, INC.

THOMAS G. JOHNSON\*  
One Shell Plaza  
Houston, Texas 77001  
(713) 241-4742

UNION PACIFIC RESOURCES  
COMPANY

CONSTANCE D. COLEMAN\*  
801 Cherry Street  
P. O. Box 7, MS 4010  
Fort Worth, Texas 76101-0007  
(817) 877-7540

*\*Counsel of Record*

## **ADDENDUM**

**ADDENDUM**

This addendum lists the parent companies, non-wholly-owned subsidiaries and affiliates of the corporate respondents joining in this brief and is filed pursuant to Rule 28.1 of the rules of this Court.

**AMOCO PRODUCTION COMPANY**

Amoco Production Company is a wholly-owned subsidiary of Amoco Corporation. To the best knowledge of counsel, affiliates of Amoco Production Company that may have securities in the hands of the public in the United States or Canada are:

- Amoco Australia Limited
- Amoco Canada Petroleum Company, Ltd.
- Amoco Company
- Amoco Credit Corporation
- Amoco Oil Holdings, S.A.
- Amoco (U.K.) Exploration Company
- Analog Devices, Inc.
- Cetus Corporation
- Cyprus Mines Corporation.

**ARCO OIL AND GAS COMPANY**

Arco Oil and Gas Company is an affiliate of Atlantic Richfield Company. The non-wholly-owned subsidiaries of Atlantic Richfield Company are:

- Alyeska Pipeline Service Company
- Anamax Mining Company
- ARCO Chemical Company
- ARCO Solar (Europe) GmbH
- ARCO Solar Nigeria Ltd.
- Arcobrasil Participacoes e Investimentos

Ltda.  
 Badger Pipeline Company  
 Black Lake Pipe Line Company  
 Blair Athol Coal Pty. Limited  
 Compania Minera Dos Republicos S.A. de C.V.  
 Compania Petrolera Centro  
 Colonial Pipeline Company  
 Cook Inlet Pipe Line Company  
 Curragh Coal Sales Co. Pty. Ltd.  
 Dixie Pipeline Company  
 East Texas Salt Water Disposal Company  
 85819 Canada Limited  
 Eisenhower Mining Company  
 FX Liquidation Corporation  
 Industrias Nacobre S.A. de C.V.  
 Iricon Agency Ltd.  
 Kenai Pipe Line Company  
 Kuparuk Transportation Company  
 Las Quintas Serenas Water Company  
 Logan Aluminum, Inc.  
 Nordisk Mineselskab A/S  
 Platte Pipe Line Company  
 Prince Consolidated Mining Company  
 Rodman, Inc.  
 Showa Arco Solar Far East Pte Ltd.  
 Showa Arco Solar KK  
 Sinclair Venezuelan Oil Company  
 Smoke House Copper Mining Company  
 Tecumseh Pipe Line Company  
 Texas-New Mexico Pipe Line Company

#### BHP PETROLEUM COMPANY INC.

BHP Petroleum Company Inc. is owned by BHP Petroleum (Americas) Inc., which is owned by BHP

Holdings USA Inc., which is owned by BHP Petroleum Proprietary, Ltd., which is owned by Broken Hill Proprietary Company, an Australian corporation. BHP Petroleum Proprietary, Ltd. owns a partial interest in Hamilton Oil Corporation.

#### CHEVRON U.S.A., INC.

Chevron U.S.A., Inc. is a wholly-owned subsidiary of Chevron Corporation. The non-wholly-owned subsidiaries and affiliates of Chevron Corporation are:

AMAX Inc.  
 Arabian American Oil Company  
 Atlas Supply Company  
 C-W Properties Inc.  
 Caltex Mediterranean Limited  
 Caltex Petroleum Corporation  
 Canyon Reef Carriers, Inc.  
 Chevron Capital N.V.  
 Chevron Capital U.S.A. Inc.  
 Chevron Investment Management Company  
 Chevron Oil Finance Company  
 Dixie Pipeline Company  
 Explorer Pipeline Company  
 Felix Oil Company  
 Glenwood Properties  
 Gulf Oil Finance Company  
 Kenai Pipe Line Company  
 Long Beach Oil Development Company  
 Mid-Valley Pipeline Company  
 Paloma Pipe Line Company  
 Pembroke Capital Company Inc.  
 Plantation Pipe Line Company  
 Platte Pipe Line Company  
 Refineria Petrolera de Guatemala-California, Inc.

Standard Pacific Gas Line Incorporated  
 UNC Incorporated  
 West Texas Gulf Pipe Line Company

#### **CITIES SERVICE OIL AND GAS CORPORATION**

Cities Service Oil and Gas Corporation is a wholly-owned subsidiary of Cities Service Company, which is in turn, a wholly-owned subsidiary of Occidental Petroleum Corporation. Its non-wholly-owned affiliates are:

Canadian Occidental of California, Inc.  
 IBP, Inc.

#### **EXXON CORPORATION**

The non-wholly-owned subsidiaries and affiliates of Exxon Corporation that may have securities in the hands of the public in the United States or Canada are:

Exxon Pipeline Company  
 Imperial Oil Limited

#### **GRACE PETROLEUM CORPORATION**

The parent company of Grace Petroleum Corporation is W. R. Grace & Company. The non-wholly-owned subsidiaries, partnerships and joint ventures of W. R. Grace & Company are:

##### **United States**

Agracetus  
 AmmTrans  
 Axial Basin Ranch Company  
 AWI

Bartow Chemical Products  
 Bison Nitrogen Products  
 Carbon Dioxide Slurry Systems L.P.  
 CFF Beverage Company  
 Colowyo Coal Company  
 Del Taco Corporation  
 Four Corners Mine  
 Ft. Meade Chemical Products  
 GHL Management, Inc.  
 Grace Drilling Company  
 Grace-Feldmuehle Motor Ceramics Company  
 Grace Ventures Partnership One  
 Hayden Gulch West Coal Company  
 H-G Coal Company  
 Home Quarters Warehouse, Inc.  
 Marine Culture Enterprises  
 Monolith Enterprises, Incorporated  
 Mountainview Insurance Company  
 National Medical Care, Inc.  
 Oklahoma Nitrogen Co.  
 Paramount Coal Company  
 Pursue Gas Processing and Petrochemical Company  
 Sierra Chemicals Company  
 Taco Villa, Inc.  
 T & D Beverage, Inc.  
 TAG Pharmaceuticals, Inc.

##### **Canada**

First New York Corp.

##### **Colombia**

Productora de Papeles S.A.

**Germany**

Feldmuehle—Grace Noxeram G.m.b.H.

**Japan**

Fuji-Davison Chemical Ltd.  
Kabushiki Kaisha Furukawa Seisakusho  
Nippon Belt Kogyo Kabushiki Kaisha  
Teroson Kabushiki Kaisha

**Trinidad and Tobago**

Homco Trinidad Ltd.  
Trinidad Nitrogen Co., Limited

**United Kingdom**

Dunbee-Elm Ltd.  
Sea Oil Homco Limited

**MARTIN EXPLORATION MANAGEMENT COMPANY**  
**COLORADO ENERGY CORPORATION**

The non-wholly-owned subsidiaries and affiliates of Martin Exploration Management Company are:

Martin Oil Marketing, Ltd.  
Martin Oil of Indiana, Inc.  
Pioneer Steel and Tube Distributors,  
Inc.  
Russell Well Servicing, Inc.  
Financial Associates, Inc.

Colorado Energy Corporation has no non-wholly-owned subsidiaries or affiliates other than those listed above.

**PENNZOIL COMPANY**

The non-wholly-owned subsidiaries and affiliates of Pennzoil Company are:

National Transit Company  
10 Minute Service Centres Limited  
The Eureka Pipe Line Company  
American Sulphur Export Corporation  
Pennzoil (U.K.) Limited  
P. T. Sungai Kencana  
P. T. Indo Muro Kencana  
Proven Properties Inc.

**PHILLIPS PETROLEUM COMPANY**

The non-wholly-owned subsidiaries and affiliates of Phillips Petroleum Company are:

Alyeska Pipeline Service Company  
Arctic LNG Transportation Company  
Bissendorf Biosciences GmbH  
Canada Western Cordage Company, Limited  
Canyon Reef Carriers, Inc.  
Chisholm Pipeline Company  
Cochin Refineries Limited  
Colonial Pipeline Company  
Dixie Pipeline Company  
East Texas Salt Water Disposal Company  
Explorer Pipeline Company  
Great Yarmouth Port Labour Company  
Limited  
Heat Transfer Research, Inc.  
Insurance & Reinsurance Brokers (Bermuda)  
Limited  
Iranian Marine International Oil Company-  
Iminoco

Kenai LNG Corporation  
 Long Beach Oil Development Company  
 Multinational Gas and Petrochemical Com  
 pany  
 Multinational Gas and Petrochemical Services  
 Limited  
 Norland GmbH Fur Grundbesitz Und Indus  
 trieanlagen  
 Norpipe A.S.  
 Norpipe Petroleum UK Limited  
 Norsea Gas A/S  
 Norsea Gas GmbH  
 Norsea Pipeline Limited  
 Oil Insurance Limited (New)  
 Papago Chemicals, Inc.  
 Phillips Carbon Black Limited  
 Phillips Petroleos Chile S.A.  
 Phillips Petroleum Singapore Chemicals (Pri-  
 vate) Limited  
 Phillips Petroleum Toray Inc.  
 Phillips-Imperial Petroleum Limited  
 Polar LNG Shipping Corporation  
 Proteina Brasileira Ltda.  
 Renoilt - Haus GmbH  
 Solar Gas, Inc.  
 Spodco Limited  
 Spodco-USA, Inc.  
 The Salk Institute Biotechnology/Industrial  
 Associates Inc.  
 Venezoil, C.A.  
 Western Desert Operating Petroleum Com-  
 pany (WEPCO)  
 White River Shale Oil Corporation

# PLACID OIL COMPANY

Placid Oil Company is a privately owned corpora-  
 tion. It has no subsidiaries or affiliates which are not  
 wholly owned.

## SHELL OFFSHORE, INC. SHELL WESTERN E & P, INC.

Shell Oil Company wholly owns all of the stock of  
 Shell Energy Resources, INC., which Company wholly  
 owns all of the stock of Pecten International Com-  
 pany, Scallop Coal Corporation, Shell Offshore INC.,  
 Shell Minng Company and Shell WESTERN E&P Inc.  
 All of Shell Oil Company's common stock is owned by  
 SPNV Holdings, Inc., a Delaware corporation, whose  
 stock is owned by Shell Petroleum N.V., a Nether-  
 lands company. The voting shares of Shell Petroleum  
 N.V. are held sixty percent (60%) by Royal Dutch  
 Petroleum Company and forty percent (40%) by Shell  
 Transport and Trading Company, a Public Limited  
 Company in London, U. K. Shell Oil Company also  
 wholly owns directly or indirectly a number of com-  
 panies. The following companies are affiliates of the  
 companies named above, but are not wholly-owned  
 subsidiaries:

Fractionation Research, Inc.  
 Gravcap, Inc.  
 Heat Transfer Research, Inc.  
 Inland Corporation  
 Loop, Inc.  
 MESBIC Financial Corporation f Houston  
 Oil Companies Institute for Marine Pollution  
 Compensation Limited  
 Oil Insurance Limited  
 Seadock, Inc.

Pecten Cameroon Company  
 Thums Long Beach Company  
 East Texas Salt Water Disposal Company  
 Grande Ecaille Land Company, Inc.  
 Van Salt Water Disposal Company  
 Wyoming Industrial Development Corporation  
 Lucky Chance Mining Company, Inc.  
 George Neuman and Company  
 United Scientific, Inc.

#### UNION OIL COMPANY OF CALIFORNIA

The non-wholly-owned affiliate of Union Oil Company of California is Union Exploration Partners, Ltd.

#### UNION PACIFIC RESOURCES COMPANY

The parent of Union Pacific Resources Company is Union Pacific Corporation. The non-wholly-owned subsidiaries and affiliates of Union Pacific Corporation are:

Bear Creek Uranium Company  
 Black Butte Coal Company  
 Camas Prairie Railroad Company  
 Carbon County Coal Company  
 Corpus Christi Petrochemical Company  
 The Denver Union Terminal Railway Company  
 Esperanza Pipeline Company  
 Ferguson-Burleson County Gas Gathering System  
 Frontier Pipeline  
 Jefferson Southwestern Railroad Company  
 Kansas City Terminal Railway Company

Longview Switching Company  
 M-C Carbon Partnership  
 Medicine Bow Coal Company  
 The Ogden Union Railway and Depot Company  
 Portland Traction Company  
 Portland Terminal Railroad Company  
 The St. Joseph and Grand Island Railway Company  
 St. Joseph Terminal Railroad Company  
 Southern Illinois and Missouri Bridge Company  
 Stansbury Coal Company  
 Stauffer Chemical Company of Wyoming  
 Trailer Train Company  
 Uinta Development Company  
 Union Pacific Corporation  
 Union Pacific Resources Ltd.  
 Upland Industries Corporation  
 The Weatherford Mineral Wells and Northwestern Railroad Company  
 Arkansas & Memphis Railway Bridge and Terminal Company  
 Automated Monitoring and Control International, Inc.  
 Central California Traction Company  
 Chicago and Western Indiana Railroad Company  
 Great Southwest Railroad, Inc.  
 Oakland Terminal Railway  
 Railroad Association Insurance Limited  
 Terminal Railroad Association of St. Louis  
 Texas City Terminal Railway Company  
 The Belt Railway Company of Chicago

12a

The Pueblo Union Depot and Railroad  
Company  
Union Pacific Realty Company

**BEST AVAILABLE COPY**

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	4
I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE CONGRES- SIONAL INTENT UNDERLYING THE NGPA .....	4
II. THE COURT OF APPEALS' DECISION WILL HAVE A SUBSTANTIAL UNWAR- RANTED ADVERSE IMPACT ON NATURAL GAS PIPELINES AND THEIR CUSTOMERS..	6
CONCLUSION .....	8
ADDENDUM .....	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Associated Gas Distributors v. FERC</i> , 824 F.2d 981 (D.C. Cir. 1987) .....	7
<i>Public Service Commission v. Mid-Louisiana Gas Co.</i> , 463 U.S. 319 (1983) .....	2, 4
<i>Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board</i> , 474 U.S. 409 (1986) .....	4, 6
STATUTES AND REGULATIONS	
Natural Gas Policy Act of 1978 (NGPA) 15 U.S.C. §§ 3311 (b) (5) .....	<i>passim</i>
3317 (c) (5) .....	2
3331 .....	2
3332 .....	2
3431 (c) (2) .....	8

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-363 and 87-364

FEDERAL ENERGY REGULATORY COMMISSION,  
*Petitioner,*

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, *et al.*,  
*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

RESPONDENT CNG TRANSMISSION CORPORATION'S  
BRIEF IN SUPPORT OF PETITIONERS

STATEMENT OF THE CASE

Respondent CNG Transmission Corporation, formerly Consolidated Gas Transmission Corporation ("CNG Transmission"), is in general agreement with and adopts

the statements and arguments set forth in the briefs of Petitioners Federal Energy Regulatory Commission ("FERC"), and Public Service Commission of the State of New York, *et al.* ("PSC").<sup>1</sup>

This case arises under the Natural Gas Policy Act of 1978 ("NGPA").<sup>2</sup> Title I, Subtitle B of the NGPA creates a scheme of phased price deregulation for most categories of natural gas. *Public Service Commission v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 336 n.14 (1983). The NGPA generally establishes maximum lawful prices for first sales of natural gas in a number of gas categories. The categories are defined by Subtitle A of Title I and are not mutually exclusive—*i.e.*, certain natural gas can qualify simultaneously under more than one provision. There is also overlap between categories that remain subject to price ceilings ("price regulated gas") and categories that are free from any maximum lawful price ("price deregulated gas").

The FERC initiated a rulemaking proceeding in 1984 to implement the statutory timetable for price deregulation of major categories of new gas. (App. 34a-52a). The FERC construed the NGPA to require that natural gas that is qualified for both price-regulated and price-deregulated status under the NGPA ("dually-qualified gas") be treated as price deregulated. (App. 73a-82a). On appeal of this rulemaking the United States Court of Appeals for the Tenth Circuit rejected the FERC's construction. The court held instead that producers of natural gas could choose whatever statutory category afforded them the highest price under their contracts and market conditions. (App. 1a-24a).

<sup>1</sup> Pursuant to U.S. Sup. Ct. Rule 28, CNG Transmission includes as an Addendum hereto a listing naming all parent companies, subsidiaries and affiliates of Respondent CNG Transmission.

<sup>2</sup> 15 U.S.C. §§ 3311(b)(5), 3317(c)(5), 3331, 3332 (1982).

Although the court of appeals acknowledged that as a result of its decision considerable gas will be sold at higher regulated prices when contract prices geared to market conditions are at a lower level, it concluded nonetheless that this result was a matter for legislative rather than judicial overview. (App. 23a-24a). The court of appeals denied rehearing and the suggestion for rehearing *en banc*. (App. 29a-31a).

### SUMMARY OF ARGUMENT

The court of appeals' conclusion that producers may shift between regulated and deregulated categories directly contravenes Congress' long-term goals. In contrast, the FERC's orders mandating the price deregulation of dually-qualified natural gas are fully consistent with congressional objectives in enacting the NGPA. Congress sought to correct the serious market distortions created by regulation of natural gas prices under the Natural Gas Act ("NGA"). The NGPA, therefore, included a plan of phased price deregulation that would gradually increase the role of market forces in determining natural gas prices. Under the interpretation of the court of appeals, real decontrol of much natural gas would never occur, and prices would be supported at artificially high levels.

The decision of the court of appeals, if permitted to stand, will impose enormous additional costs on purchases of natural gas and will result in substantial prejudice to natural gas pipelines and their customers. CNG Transmission, a natural gas pipeline serving 3,000,000 customers in New England and the Mid-Atlantic states, has estimated that as a result of this decision its gas purchase costs will increase substantially. This increase will occur at a time of surplus natural gas deliverability, a result directly contrary to the establishment of prices by market forces rather than government regulation. The decision of the court of appeals should therefore be reversed.

## ARGUMENT

### I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE CONGRESSIONAL INTENT UNDERLYING THE NGPA

The court of appeals' conclusion that producers have the right to choose between regulated and deregulated pricing status directly conflicts with Congress' objectives in adopting the NGPA. In the NGPA, Congress sought to correct the market distortions that had accompanied the regulation of natural gas prices under the NGA. *Mid-Louisiana*, 463 U.S. at 330-31. Congress believed that the NGA's price controls had created an imbalance in supply and demand by holding regulated prices below market levels and by preventing the free market from making long-term adjustments. *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 420 (1986). Through the NGPA, Congress attempted to give market forces a more significant role in determining the price and, consequently, the supply and demand of natural gas. *Id.* at 420-21. This change in regulatory perspective reflected Congress' belief that the free market would provide consumers with the most dependable and the most reasonably priced supply of natural gas. To this end, the NGPA provided both for interim incentive prices and for phased price deregulation. *Id.*

In light of the broad policies that Congress sought to implement by passage of the NGPA, the court of appeals' decision, which turns on its interpretation of NGPA section 101(b)(5), defies logic. NGPA section 101(b)(5) provides:

If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or any exemption from such price

with respect to any first sale of such natural gas, the provision which *could* result in the highest price shall be applicable.<sup>3</sup>

In its rulemaking, the FERC held that section 101(b)(5) supports its construction of the NGPA: gas that is qualified for both price-regulated and price-deregulated status would be treated as deregulated. According to the FERC, a deregulated price "always *could* result in a higher price than a regulated price . . ." (App. 79a) (emphasis in original). The court of appeals rejected this straight-forward analysis on the ground that the price of *regulated* gas "could" also be higher than the price of *deregulated* gas. (App. 15a-16a). The court of appeals' proposition contravenes any meaningful understanding of the statutory language. The more logical presumption—particularly at the time that Congress enacted the NGPA—is that a deregulated price "could" be higher than a price subject to regulatory controls.

The court of appeals further held that the term "could" in section 101(b)(5) must be interpreted by examining the prices to be paid in each actual sales transaction. (App. 16a). This approach contravenes the statute's price deregulation timetable and its mandate that contracts determine natural gas prices. As the FERC recognized, "whether the *contract* allows the producer to collect a price higher than a regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA." (App. 111a) (emphasis in original). An actual comparison of applicable prices at each moment to determine the regulatory status of sales of dually-qualified gas is clearly outside the deregulated, market-based pricing scheme envisioned by Congress.

Additionally, the court of appeals maintained that by focusing on the NGPA's price deregulation provisions,

<sup>3</sup> 15 U.S.C. § 3311(b)(5) (1982) (emphasis added). (Hereinafter cited as NGPA Section 101(b)(5)).

the FERC improperly overlooked congressionally-mandated incentives aimed at increasing gas supplies. (App. 22a). The court of appeals failed to appreciate, however, that the prospect of price deregulation was also an incentive to the exploration and development of additional gas reserves by producers. (See App. 74a n.10). Moreover, price deregulation was intended to eliminate the need for continued incentives because the market would provide sufficient incentives to balance supply and demand.

Under the court of appeals' reading of NGPA section 101(b)(5), Congress' ultimate goal of achieving an increasingly decontrolled market for natural gas would be frustrated because deregulation would never fully occur with respect to dually-qualified gas. At any time, producers could elect price control over decontrol, depending upon which option suited them best. Thus, in times of excess supply, producers would be shielded from the lower prices dictated by the market. On the other hand, producers could take advantage of higher prices caused by a shortage in supply. The court of appeals' decision is therefore contrary to the congressional effort to allow market forces to determine prices and "to eliminate the distortive effects that NGA price control had had on supply and demand." *Transcontinental Gas Pipe Line Corp.*, 474 U.S. at 424, n.6.

## II. THE COURT OF APPEALS' DECISION WILL HAVE A SUBSTANTIAL UNWARRANTED ADVERSE IMPACT ON NATURAL GAS PIPELINES AND THEIR CUSTOMERS

Respondent CNG Transmission, a natural gas pipeline serving distributors in New York, Ohio, Pennsylvania, and West Virginia, purchases natural gas that is qualified for both a regulated and a deregulated price category. Under the court of appeals' decision, prices for dually-qualified gas will be held at artificially high levels. Producers will presumably elect price regulated cate-

gories because regulated prices are higher than the current prices available under contract provisions applicable in the event of deregulation. CNG Transmission estimates that, as the result of these producer elections, the cost of gas that CNG Transmission purchases will increase substantially, notwithstanding the current surplus of natural gas supply deliverability.

Additionally, many existing gas purchase contracts between CNG Transmission and producers provide for price renegotiation if deregulation occurs. Under the decision of the court of appeals, gas reserves subject to these contracts may never be in a deregulated category because deregulated status depends on a renegotiated price that is higher than the regulated price. Since the prerequisite for a renegotiated price is deregulation itself, such price renegotiation will not occur. Although the court of appeals recognized this anomalous situation, it dismissed the problem in a footnote, as if it would have little overall impact. (App. 16a-17a, n.11). A contrary conclusion is true for CNG Transmission which purchases significant amounts of gas under contracts with provisions that lead to this "Catch-22." The problem affects 60 percent of CNG Transmission's producer gas eligible for deregulation. Although CNG Transmission's contracts anticipate deregulation, this gas will remain subject to regulatory controls and, consequently, to artificially higher prices.

The FERC estimates that the nationwide, 1985-1987 cost of the court of appeals' decision in higher natural gas prices is approximately \$300 million. The effects will be further reaching, however, because many gas purchase contracts contain take-or-pay provisions. To the extent that gas is rendered unmarketable by the artificially higher prices, it could be shut-in. Thus, higher prices will aggravate both the current surplus and the enormous take-or-pay burden faced by pipelines. See *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1023 (D.C. Cir. 1987).

The higher annual gas costs flowing from the court of appeals' decision will be passed on to ultimate consumers by virtue of NGPA section 601(c)(2), 15 U.S.C. 3431 (c)(2) (1982), which provides for guaranteed pass-through of NGPA-determined prices, absent fraud, abuse, or similar grounds. Thus, if the court of appeals' decision is allowed to stand, the congressional aim of providing customers with adequate supplies of gas at reasonable prices will be frustrated.

### CONCLUSION

The court of appeals' interpretation of NGPA section 101(b)(5) is inconsistent with Congress' long-term goals in enacting the NGPA. The judgment of the court of appeals should be reversed.

Respectfully submitted,

DAVID E. WEATHERWAX  
Senior Vice President and  
General Counsel  
CONSOLIDATED NATURAL GAS  
SERVICE COMPANY, INC.  
CNG Tower  
625 Liberty Avenue  
Pittsburgh, PA 15222

MARK G. MAGNUSON  
CONSOLIDATED NATURAL GAS  
SERVICE COMPANY, INC.  
1101 16th Street, N.W.  
Washington, D.C. 20036

JOHN E. HOLTZINGER, JR.  
Counsel of Record  
JOSEPH E. STUBBS  
LOREN S. MELTZER  
NEWMAN & HOLTZINGER, P.C.  
1615 L Street, N.W., Suite 1000  
Washington, D.C. 20036  
(202) 955-6600

STEPHEN E. WILLIAMS  
General Counsel  
GEORGIA B. CARTER  
CNG TRANSMISSION  
CORPORATION  
445 West Main Street  
Clarksburg, WVA 26301  
*Counsel for CNG Transmission  
Corporation*

January 14, 1988

### ADDENDUM REQUIRED BY RULE 28

Respondent CNG Transmission Corporation is a wholly-owned subsidiary of Consolidated Natural Gas Company. Other subsidiaries of Consolidated Natural Gas Company are:

CNG Coal Company;  
CNG Development Company;  
CNG Energy Company;  
CNG Producing Company;  
CNG Research Company;  
CNG Trading Company;  
Consolidated Natural Gas Service Company, Inc.;  
Consolidated System LNG Company;  
Hope Gas, Inc.;  
The East Ohio Gas Company;  
The Peoples Natural Gas Company;  
The River Gas Company;  
West Ohio Gas Company.

JAN 14 1988

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL.,  
PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF FOR THE FEDERAL ENERGY  
REGULATORY COMMISSION**

DONALD B. AYER  
*Acting Solicitor General*

LOUIS R. COHEN  
*Deputy Solicitor General*

RICHARD G. TARANTO  
*Assistant to the Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

CATHERINE C. COOK  
*General Counsel*

JEROME M. FEIT  
*Solicitor*

JOEL M. COCKRELL

JOHN H. CONWAY

*Attorneys*  
*Federal Energy Regulatory Commission*  
*Washington, D.C. 20426*

## QUESTIONS PRESENTED

1. Whether, as the Federal Energy Regulatory Commission determined, natural gas that is covered by two provisions of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*—one of which sets a ceiling on prices, the other of which declares prices deregulated—must be treated as deregulated gas under the NGPA; or whether, instead, producers may choose, perhaps daily, the classification that, under current market conditions and their contracts, affords them the highest price.

2. Whether the Commission's ruling that most "new tight formation gas" under Section 107(c)(5) of the NGPA is automatically new gas under Section 102 or 103 of the Act is consistent with the Commission's authority under the NGPA.

## PARTIES TO THE PROCEEDINGS

The petitioner in No. 87-363 is the Federal Energy Regulatory Commission. The respondents are Martin Exploration Management Company; Colorado Energy Corporation; Phillips Petroleum Company; Phillips Oil Company; Exxon Corporation; Shell Off-Shore, Inc.; Shell Western E & P, Inc.; Independent Oil & Gas Association of West Virginia; Amoco Production Company; Arco Oil & Gas Company; Ohio Oil and Gas Association; Independent Oil and Gas Association of West Virginia; Gulf Oil Corporation, successor to Chevron, U.S.A., Inc.; Union Oil Company of California; Champlin Petroleum Company; Pennzoil Company; Pennzoil Oil & Gas, Inc.; Pennzoil Producing Company; Placid Oil Company; Tennessee Gas Pipeline Company, a division of Tenneco, Inc.; Pacific Gas & Electric Company; Amoco Production Company; Transok, Inc.; Oklahoma Natural Gas Company, a division of Oneok, Inc.; Associated Gas Distributors; Public Service Commission of the State of New York; Pacific Lighting Gas Supply Company; Southern California Gas Company; Consolidated Gas Transmission Corporation; Panhandle Eastern Pipe Line Company; Cities Service Oil and Gas Corporation; Grace Petroleum Corporation; Valero Transmission Company; BHP Petroleum Company, Inc., successor to Monsanto Oil Company; Texas Eastern Transmission Corporation; Transwestern Pipeline Company; United Gas Pipe Line Company; United Texas Transmission Company; and Texas Gas Transmission Corporation.

The petitioners in No. 87-364 are the Public Service Commission of the State of New York; Consolidated Gas Transmission Corp.; Tennessee Gas Pipeline Co., a Division of Tenneco Inc.; Panhandle Eastern Pipe Line Co.; and Associated Gas Distributors. The respondents are all the other parties listed in the preceding paragraph.

## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	2
Statutes and regulations involved .....	2
Statement .....	3
A. Statutory background .....	3
B. The Commission's rulings .....	11
C. The court of appeals decision .....	15
Summary of argument .....	18
Argument:	
I. The Commission correctly concluded that Section 101(b)(5) of the NGPA requires the deregulation of natural gas that is qualified for both regulated and deregulated treatment .....	20
A. When gas is qualified under two NGPA pricing provisions, Section 101(b)(5) determines which provision is applicable based on a comparison of the ceiling prices, if any, set under those provisions, not a comparison of particular producers' contract prices .....	21
B. The overall scheme and history of the NGPA preclude permitting producers to select regulated treatment at a higher price for gas that is qualified for deregulated treatment at a lower price .....	28
C. Deference is due to the Commission's construction of the NGPA .....	39
II. The Commission properly ruled that most new tight formation gas is automatically qualified for deregulated treatment .....	40
Conclusion .....	43

## TABLE OF AUTHORITIES

## Cases:

<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984) .....	39, 40
---	--------

## IV

## Cases—Continued:

	Page
<i>Clarke v. Securities Industry Ass'n</i> , No. 85-971 (Jan. 14, 1987) .....	39
<i>Consumer Product Safety Comm'n v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980) .....	21
<i>FPC v. Louisiana Power &amp; Light Co.</i> , 406 U.S. 621 (1972) .....	4
<i>FPC v. Texaco, Inc.</i> , 417 U.S. 380 (1974) .....	26
<i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.</i> , No. 86-473 (Dec. 1, 1987) .....	21, 24
<i>INS v. Cardoza-Fonseca</i> , No. 85-782 (Mar. 9, 1987) .....	39, 40
<i>Interstate Natural Gas Co. v. FPC</i> , 331 U.S. 682 (1947) ..	5
<i>Japan Whaling Ass'n v. American Cetacean Society</i> , No. 85-954 (June 30, 1986) .....	39
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933) .....	39
<i>Pennhurst State School &amp; Hospital v. Halderman</i> , 451 U.S. 1 (1981) .....	25
<i>Phillips Petroleum Co. v. Wisconsin</i> , 347 U.S. 672 (1954) .....	3, 5
<i>Public Service Comm'n v. Mid-Louisiana Gas Co.</i> , 463 U.S. 319 (1983) .....	4, 6, 7, 31, 40
<i>Transcontinental Gas Pipe Line Corp. v. State Oil &amp; Gas Bd.</i> , 474 U.S. 409 (1986) .....	7, 30
<i>United Gas Pipe Line Co. v. Mobile Gas Service Corp.</i> , 350 U.S. 332 (1956) .....	26
<i>United States v. Shimer</i> , 367 U.S. 374 (1961) .....	40
<i>Young v. Community Nutrition Institute</i> , No. 85-664 (June 17, 1986) .....	39

## Statutes and regulations:

Natural Gas Act, 15 U.S.C. 717 <i>et seq.</i> .....	3
§ 4, 15 U.S.C. 717c .....	3, 26
§ 5, 15 U.S.C. 717d .....	3, 26
Natural Gas Policy Act of 1978, 15 U.S.C. 3301 <i>et seq.</i> :	
§ 2(21), 15 U.S.C. 3301(21) .....	8
§ 2(29), 15 U.S.C. 3301(29) .....	9
§ 101, 15 U.S.C. 3311 .....	8
§§ 101-110, 15 U.S.C. 3311-3320 .....	8
§ 101(b), 15 U.S.C. 3311(b) .....	11
§ 101(b)(5), 15 U.S.C. 3311(b)(5) .....	<i>passim</i>

## V

## Statutes and regulations—Continued:

	Page
§ 101(b)(9), 15 U.S.C. 3311(b)(9) .....	16, 26
§ 102, 15 U.S.C. 3312 .....	<i>passim</i>
§§ 102-109, 15 U.S.C. 3312-3319 .....	8
§ 102(c), 15 U.S.C., 3312(c) .....	17, 20, 40, 41, 42
§ 102(d), 15 U.S.C. 3312(d) .....	14
§ 103, 15 U.S.C. 3313 .....	<i>passim</i>
§ 104, 15 U.S.C. 3314 .....	9
§ 104(b)(2), 15 U.S.C. 3314(b)(2) .....	15, 16
§ 105, 15 U.S.C. 3315 .....	9, 27, 38
§ 105(b)(3), 15 U.S.C. 3315(b)(3) .....	10, 38, 39
§ 106(a), 15 U.S.C. 3316(a) .....	9
§ 106(b), 15 U.S.C. 3316(b) .....	9
§ 106(c), 15 U.S.C. 3316(c) .....	15, 16
§ 107, 15 U.S.C. 3317 .....	8
§ 107(c)(1)-(4), 15 U.S.C. 3317(c)(1)-(4) .....	8, 9, 34, 39, 42
§ 107(c)(5), 15 U.S.C. 3317(c)(5) .....	<i>passim</i>
§ 108, 15 U.S.C. 3318 .....	8, 29, 36, 38
§ 108(b), 15 U.S.C. 3318(b) .....	9
§ 109, 15 U.S.C. 3319 .....	8
§ 109(b)(2), 15 U.S.C. 3319(b)(2) .....	15, 16
§ 110, 15 U.S.C. 3320 .....	8
§ 121, 15 U.S.C. 3331 .....	2, 9, 13, 15, 28, 40
§§ 121-123, 15 U.S.C. 3331-3333 .....	8
§ 121(a), 15 U.S.C. 3331(a) .....	9, 10, 15, 38
§ 121(b), 15 U.S.C. 3331(b) .....	9, 10
§ 121(c), 15 U.S.C. 3331(c) .....	9, 10
§ 121(d), 15 U.S.C. 3331(d) .....	10
§ 121(e), 15 U.S.C. 3331(e) .....	9, 10, 38
§ 122, 15 U.S.C. 3332 .....	2, 28
§ 501, 15 U.S.C. 3411 .....	39, 41
§ 501(a), 15 U.S.C. 3411(a) .....	35
§ 501(b), 15 U.S.C. 3411(b) .....	35
§ 503, 15 U.S.C. 3413 .....	10, 35, 41
§ 503(a)(2), 15 U.S.C. 3413(a)(2) .....	41
§ 503(b), 15 U.S.C. 3413(b) .....	35
§ 504(a), 15 U.S.C. 3414(a) .....	26
§ 504(a)(1), 15 U.S.C. 3414(a)(1) .....	26
§ 506, 15 U.S.C. 3416 .....	15
§ 601, 15 U.S.C. 3431 .....	26, 28

## VI

## Regulations — Continued:

## Page

## 18 C.F.R.:

Pt. 270:	
Section 270.208 .....	2, 12, 13
Pt. 271:	
Section 271.703(b) .....	14, 42
Section 271.703(b)(2) .....	17
Section 271.703(b)(3) .....	17
Pt. 272:	
Section 272.103(a) .....	12
Pt. 274 .....	10
Sections 274.201-274.208 .....	11
Section 274.205(e)(1)(i)(A) .....	14, 42
Section 274.205(e)(1)(i)(B) .....	14, 42
Section 274.501 .....	11

## Miscellaneous:

Allison, <i>Natural Gas Pricing: The Eternal Debate</i> , 37	
Baylor L. Rev. 1 (1985) .....	32
Breyer & MacAvoy, <i>The Natural Gas Shortage and the Regulation of Natural Gas Producers</i> , 86 Harv. L. Rev. 941 (1973) .....	4
101 Cong. Rec. 11859-11861 (1955) .....	5
121 Cong. Rec. (1975):	
pp. 30735-30737 .....	4, 32, 33
p. 30739 .....	32
p. 30898 .....	4
pp. 30902-30903 .....	32
p. 30908 .....	4, 32, 33
p. 30914 .....	5, 32
p. 30930 .....	34
p. 30935 .....	4
p. 31201 .....	4
p. 31211 .....	35
pp. 31215-31218 .....	33
p. 31223 .....	4, 5, 33
pp. 31230-31234 .....	5
p. 31250 .....	32, 33
pp. 31358-31359 .....	33
p. 31369 .....	4
pp. 31370-31374 .....	5

## VII

## Miscellaneous — Continued:

## Page

p. 31803 .....	33
p. 31982 .....	3
p. 31983 .....	5
pp. 31988-31992 .....	33
p. 32299 .....	5
p. 33636 .....	5
pp. 33655-33659 .....	5
122 Cong. Rec. (1976):	
pp. 2385-2388 .....	5
pp. 2387-2388 .....	32
p. 2645 .....	5
123 Cong. Rec. (1977):	
p. 25894 .....	33
p. 25897 .....	32
p. 25898 .....	33
p. 25914 .....	6
p. 25916 .....	33
p. 25923 .....	33
p. 25926 .....	33
p. 25932 .....	33
p. 25936 .....	32
pp. 25938-25940 .....	32
pp. 26448-26450 .....	6
p. 26452 .....	6
p. 26453 .....	33, 34
p. 26454 .....	38
p. 26455 .....	30
p. 26457 .....	34
p. 26458 .....	33
p. 26460 .....	33
p. 26467 .....	33
p. 26482 .....	35
pp. 26482-26483 .....	6
pp. 27244-27245 .....	6
p. 29780 .....	33, 38
p. 29781 .....	32
pp. 29781-29782 .....	33
p. 29783 .....	6, 30, 34
p. 29784 .....	30, 34
pp. 29784-29786 .....	7, 32
p. 29786 .....	6

## VIII

## Miscellaneous — Continued:

## Page

pp. 29925-29926 .....	33
p. 29927 .....	32
p. 29931 .....	30
pp. 30186-30187 .....	32
p. 30188 .....	34
p. 30373 .....	33
p. 30379 .....	34
pp. 30388-30390 .....	33
pp. 30741-30742 .....	32
pp. 31163-31165 .....	7
p. 31251 .....	34
p. 31252 .....	30, 33
p. 31572 .....	34
pp. 31774-31775 .....	33
p. 32306 .....	6
124 Cong. Rec. (1978):	
p. 28632 .....	34
p. 28633 .....	9, 34, 42
p. 28634 .....	29
pp. 28634-28635 .....	32
p. 28635 .....	32
p. 28637 .....	33
p. 28642 .....	29, 34
p. 28645 .....	29
p. 28648 .....	33
p. 28651 .....	37
p. 28875 .....	37
p. 28877 .....	30
p. 28881 .....	32
p. 28882 .....	30
pp. 28883-28884 .....	34
p. 28884 .....	29
p. 28886 .....	29
p. 29103 .....	30
p. 29109 .....	16, 37, 41
p. 29386 .....	37
p. 29404 .....	32
p. 29659 .....	28
pp. 29665-29669 .....	37
p. 30038 .....	37
p. 31387 .....	37

## IX

## Miscellaneous — Continued:

## Page

pp. 38352-38354 .....	37
pp. 38355-38358 .....	38
p. 38361 .....	7, 8, 28, 31, 34, 38
pp. 38361-38362 .....	34
p. 38363 .....	23
pp. 38363-38364 .....	16-17, 37
p. 38364 .....	10, 27, 37
FERC, <i>Joint Comments of Indicated Producers</i> (Oct. 26, 1975) .....	40
Haase, <i>The Federal Role in Implementing the Natural Gas Policy Act of 1978</i> , 16 Hous. L. Rev. 1067 (1979) .....	7
H.R. 1758, 81st Cong., 2d Sess. (1950) .....	5
H.R. 5289, 95th Cong., 2d Sess. (1978) .....	7
H.R. 6645, 84th Cong., 2d Sess. (1956) .....	5
H.R. 8444, 95th Cong., 1st Sess. (1977) .....	6
H.R. 9464, 94th Cong., 2d Sess. (1976) .....	5
H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. (1978) ...	<i>passim</i>
H.R. Rep. 94-732, 94th Cong., 1st Sess. (1975) .....	4
H.R. Rep. 95-543, 95th Cong., 1st Sess. Pt. 2 (1977) .....	3, 6, 32, 33
Moody & Garten, <i>The Natural Gas Policy Act of 1978: Analysis and Overview</i> , 25 Rocky Mtn. Min. L. Inst. 2 (1979) .....	32
Note, <i>Legislative History of the Natural Gas Policy Act: Title I</i> , 59 Tex. L. Rev. 101 (1980) .....	4, 7
Pierce, <i>Natural Gas Regulation, Deregulation, and Contracts</i> , 68 Va. L. Rev. 63 (1982) .....	32
1950 Pub. Papers 257 (Apr. 15, 1950) .....	5
1956 Pub. Papers 256-257 (Feb. 17, 1956) .....	5
S. 2104, 95th Cong., 1st Sess. (1977) .....	6
S. 2310, 94th Cong., 1st Sess. (1975) .....	5
S. Rep. 95-436, 95th Cong., 1st Sess. (1977) .....	6, 7, 33, 38
D. Zillman & L. Lattman, <i>Energy Law</i> (1983) .....	12

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

---

No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

---

No. 87-364

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL.,  
PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

**BRIEF FOR THE FEDERAL ENERGY  
REGULATORY COMMISSION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-28a)<sup>1</sup> is reported, as modified, at 813 F.2d 1059. The order of the court of appeals modifying the original opinion (Pet. App. 29a-31a) is not separately reported. The notice of proposed rulemaking of the Federal Energy Regulatory Commission (FERC) (Pet. App. 34a-60a) is reported at 49 Fed. Reg. 36399. The opinion accompanying issuance of

---

<sup>1</sup> "Pet. App." refers to the appendix to the petition in No. 87-363.

the final rule by FERC (Pet. App. 61a-103a) is reported at 49 Fed. Reg. 46874 and F.E.R.C. Stats. and Regs. para. 30,662. The FERC opinion denying rehearing in relevant part (Pet. App. 104a-126a) is reported at 49 Fed. Reg. 50637.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on March 9, 1987. Petitions for rehearing were denied, with modifications of the original decision (Pet. App. 29a-31a), on May 1, 1987. On July 22, 1987, Justice White extended the time for filing petitions for a writ of certiorari to and including August 31, 1987, and the petitions were filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES AND REGULATIONS INVOLVED

Section 101(b)(5) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3311(b)(5), provides:

If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Sections 107(c)(5), 121, and 122 of the NGPA, 15 U.S.C. 3317(c)(5), 3331, 3332, are set out in the appendix to the petition in No. 87-363 (Pet. App. 127a-131a).

Section 270.208 of 18 C.F.R. provides:

First sales of natural gas that is deregulated natural gas as defined in § 272.103(a) is [*sic*] price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

### STATEMENT

The Commission construed the Natural Gas Policy Act (NGPA or Act), in accordance with the Act's overall scheme of phased-in deregulation, to require that producers treat as deregulated any natural gas that is qualified for such status even if it is also qualified for price-regulated status. It also ruled that certain gas eligible for special pricing under Section 107(c)(5) of the Act, 15 U.S.C. 3317(c)(5), is automatically qualified for deregulated treatment under Section 102 or 103, 15 U.S.C. 3312, 3313. The court of appeals rejected the Commission's construction of the Act (Pet. App. 10a) and held that producers of natural gas could choose whatever statutory category affords them the highest price under their contracts and market conditions at any particular moment, even if the choice means returning deregulated gas to regulated status (*id.* at 17a, 30a). In explaining that holding, the court also rejected the Commission's ruling on Section 107(c)(5) gas.

#### A. Statutory Background

1. In 1938, Congress enacted the Natural Gas Act, 15 U.S.C. 717 *et seq.*, to govern certain aspects of the interstate natural gas industry. This Court held in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), that the Natural Gas act applied to producers' sales, at the wellhead, of gas for resale in interstate commerce. Accordingly, from the mid-1950s until 1978, the Federal Energy Regulatory Commission (and its predecessor, the Federal Power Commission) established just-and-reasonable ceiling rates for such producer sales, pursuant to Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c, 717d. Those rates were based largely on the historical costs of production. See, e.g., H.R. Rep. 95-543, 95th Cong., 1st Sess. Pt. 2, at 386 (1977); 121 Cong. Rec. 31982 (1975) (Sen. Stevenson).

At least by the early 1970s, the federally established rates were lower than the prices producers could command for gas sold in unregulated intrastate markets. See *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 327-331 (1983). It quickly "became clear that the existing regulatory structure was inadequate" (Pet. App. 3a). The increasing costs of alternative fuels and the benefits of natural gas for environmental reasons generally raised demand for natural gas; and the combination of price ceilings applicable to interstate sales under the Natural Gas Act and the absence of similar constraints on intrastate sales artificially reduced supply and inflated demand in the interstate market. *Ibid.*; Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941 (1973); Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 106-112 (1980). The result of this imbalance in supply and demand was the emergence of a chronic natural gas shortage. See *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972).

Both houses in the 94th Congress (1975-1976) passed bills addressed to the problem. Both recognized that regulated prices in the interstate market were "unnaturally low" (121 Cong. Rec. 31201 (1975) (Sen. Glenn); *id.* at 30935 (Sen. Bayh), 31369 (Sen. Stevenson)) and that the different treatment of the interstate and intrastate markets was a substantial cause of the shortages in the interstate market (see, e.g., H.R. Rep. 94-732, 94th Cong., 1st Sess. 5-8, 48, 54 (1975); 121 Cong. Rec. 31223 (1975) (Sen. Fannin)). The two houses, however, adopted contrary approaches to the problem.

The Senate, responding to numerous calls for deregulation of prices led by the Senators from the gas-producing states (see, e.g., 121 Cong. Rec. 30735-30737 (1975) (Sen. Bartlett of Oklahoma, Sen. Long of Louisiana); *id.* at 30898 (Sen. Bartlett), 30908 (Sen. Bentsen of Texas),

30914 (Sen. Tunney of California), 31230-31234 (bill proposed by Sen. Pearson of Kansas and Sen. Bentsen); *id.* at 31223 (Sen. Fannin of Arizona)), passed a bill (S. 2310, 94th Cong., 1st Sess. (1975)) that generally would have deregulated producer sales within one year for new on-shore gas and within five years for new offshore gas (see 121 Cong. Rec. 33655-33659 (1975)). In so doing, the Senate refused to adopt proposals to extend price regulation from the interstate to intrastate markets (*id.* at 31370-31374, 31983, 32299, 33636). The House took roughly the opposite approach. It rejected a deregulation proposal (122 Cong. Rec. 2645 (1976)) and passed a bill (H.R. 9464, 94th Cong., 2d Sess. (1976)) that would have deregulated certain sales by small "independent" producers, extended federal price regulation to intrastate markets, and introduced production incentives into the setting of federal ceilings (122 Cong. Rec. 2385-2388 (1976)). Both the House and Senate bills died in the 94th Congress.<sup>2</sup>

2. Against that background, in 1977, during the first session of the 95th Congress, the House and Senate again each passed bills designed to address the problem. Again

<sup>2</sup> Attempts by producers to obtain partial or complete deregulation were twice before almost successful. In 1950, following this Court's decision in *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947), Congress passed a bill (H.R. 1758, 81st Cong., 2d Sess.) that would have deregulated producer sales to interstate pipelines with which the producer was not affiliated. President Truman vetoed the bill, citing the need for continued regulation (see 1950 Pub. Papers 257 (Apr. 15, 1950)). In 1956, in response to this Court's decision in *Phillips Petroleum Co. v. Wisconsin*, *supra*, Congress narrowly passed a bill (H.R. 6645, 84th Cong., 2d Sess.) that would have deregulated all producer sales (see 101 Cong. Rec. 11859-11861 (1955) (describing bill)). President Eisenhower vetoed the bill, explaining that, although he was in sympathy with its objectives, certain producers had engaged in ethically questionable practices in urging at least one member of Congress to vote for the bill (see 1956 Pub. Papers 256-257 (Feb. 17, 1956)).

both houses recognized that interstate gas had been "underpriced" (H.R. Rep. 95-543, *supra*, at 7; S. Rep. 95-436, 95th Cong., 1st Sess. 20 (1977); 123 Cong. Rec. 29783 (1977) (Sen. Hansen); *id.* at 29786 (Sen. Pearson)) and that the distinction between the interstate and intrastate markets should be broken down (see, e.g., H.R. Rep. 95-543, *supra*, at 10, 19, 392; S. Rep. 95-436, *supra*, at 2, 21). And again, the debate was between those favoring deregulation and those favoring extension of federal price ceilings into the intrastate markets (see H.R. Rep. 95-543, *supra*, at 391-392), with the House adopting the latter view and the Senate adopting a bill that moved toward deregulation.

The House bill (H.R. 8444, 95th Cong., 1st Sess. (1977)), part of a broader National Energy Act proposed by President Carter, would have extended regulatory controls by imposing uniform price regulation, at levels intended to encourage production, on all natural gas, interstate and intrastate (123 Cong. Rec. 27244-27245 (1977)). See H.R. Rep. 95-543, *supra*, at 10, 19, 392-393; see also H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. 67 (1978) (describing House bill). In the course of considering the bill, the House defeated a proposal that would have deregulated new onshore gas immediately and new offshore gas in 1982 (123 Cong. Rec. 26448-26450 (1977) (Brown amendment); *id.* at 25914 (describing amendment), 26452 (same), 26482-26483 (amendment defeated)). The Senate took a "significantly different approach" (H.R. Conf. Rep. 95-1752, *supra*, at 68). Its bill (S. 2104, 95th Cong., 1st Sess. (1977)) would have left intrastate gas unregulated and would have deregulated new onshore natural gas in two years and new offshore gas in 1982, with certain price controls in the interim (123 Cong. Rec. 32306 (1977)). See *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. at 331-332; H.R. Conf. Rep. 95-1752, *supra*, at 68. The Senate passed this bill in lieu of

the proposed Committee bill, which was similar to the House bill and did not provide for deregulation (see S. Rep. 95-436, *supra*, at 2-5)), and in lieu of a proposal (made initially by the sponsors of the ultimately enacted bill) for faster deregulation of new onshore gas (see 123 Cong. Rec. 29784-29786, 31163-31165 (1977)).

The conflict between the houses went to a Conference Committee, which proposed an entirely new bill roughly one year later (H.R. 5289, 95th Cong., 2d Sess. (1978); H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. (1978)). The conference bill struck a compromise between the House's proposed increased regulation and the Senate's proposal for deregulation of new gas within two to five years (see H.R. Conf. Rep. 95-1752, *supra*, at 67-68; 124 Cong. Rec. 38361 (1978) (remarks of Rep. Dingell); *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. at 331). The bill broke down the distinction between interstate and intrastate gas and brought all gas under a single "national market price regulatory scheme." *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 421 (1986) (quoting Haase, *The Federal Role in Implementing the Natural Gas Policy Act of 1978*, 16 Hous. L. Rev. 1067, 1079 (1979)). It removed large quantities of gas from the entire regulatory scheme of the Natural Gas Act, and with respect to price in particular, it replaced Commission-set ceilings (at "just and reasonable" rates) with ceilings generally set directly by statute, several designed to provide incentives for new production. The bill also mandated "deregulation of most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68) after transition periods of up to nine years. See Note, *supra*, 59 Tex. L. Rev. at 116. Enacted as the NGPA, the bill thus "comprehensively and dramatically changed the method of pricing natural gas produced in the United States" (*Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. at 322).

3. Title I of the NGPA creates the scheme of “[p]hased deregulation” (124 Cong. Rec. 38361 (1978) (Rep. Dingell)) in two stages. Subtitle A (NGPA §§ 101-110, 15 U.S.C. 3311-3320) defines numerous categories of natural gas and establishes (or, in a few exceptional cases, permits the Commission to set) a gradually increasing “maximum lawful price” for wellhead “first sale[s]” of gas in each category.<sup>3</sup> Subtitle B (NGPA §§ 121-123, 15 U.S.C. 3331-3333) then provides for the removal of certain of those ceilings after periods ranging from several months to nine years.

More particularly, the categories of natural gas defined by Subtitle A,<sup>4</sup> aside from a catch-all residual category (NGPA § 109, 15 U.S.C. 3319), fall roughly into three groups. First, and of primary importance to these cases, four provisions set prices (or, in one instance, authorize the Commission to do so) that are designed to furnish incentives for new production: Sections 102 and 103, 15 U.S.C. 3312, 3313, cover certain new natural gas<sup>5</sup>; Section 107, 15 U.S.C. 3317, covers certain “high-cost” natural gas<sup>6</sup>; Section 108, 15 U.S.C. 3318, covers gas from certain

<sup>3</sup> A “first sale” is most often, but not exclusively, a sale by the producer of the natural gas (NGPA § 2(21), 15 U.S.C. 3301(21)).

<sup>4</sup> The category-defining sections are Sections 102-109, 15 U.S.C. 3312-3319. Section 101, 15 U.S.C. 3311, defines the annual inflation adjustment factor and other “[r]ules of general application” relevant to the remainder of the Act. Section 110, 15 U.S.C. 3320, concerns the treatment of state severance taxes and certain production-related costs.

<sup>5</sup> Section 102, 15 U.S.C. 3312, covers gas from a new reservoir, from certain Outer Continental Shelf leases, or from a new well drilled sufficiently far from certain existing “marker” wells. Section 103, 15 U.S.C. 3313, covers certain new onshore production wells.

<sup>6</sup> Section 107, 15 U.S.C. 3317, defines four categories of high-cost gas (Subsections (c)(1) through (4)) and allows the Commission to designate other gas that is especially costly or risky to produce (Subsection (c)(5)).

low-producing “stripper” wells.<sup>7</sup> Second, two provisions (§§ 104, 106(a), 15 U.S.C. 3314, 3316(a)) cover “old” interstate gas — gas dedicated to interstate commerce prior to the NGPA’s effective date or sold under “rollover” interstate contracts; those provisions set non-incentive, consumer-protective price ceilings based on the Natural Gas Act. Third, two provisions (§§ 105 and 106(b), 15 U.S.C. 3315, 3316(b)) cover “old” intrastate gas, defined analogously to “old” interstate gas, and set price ceilings tied to those for “new” Section 102 gas.

The central provision of Subtitle B is Section 121, 15 U.S.C. 3331, which mandates a three-stage elimination of price ceilings for certain of the categories of natural gas specified in Subtitle A. First, pursuant to Section 121(b), 15 U.S.C. 3331(b), price ceilings were removed on November 1, 1979, for the “high-cost” gas defined by Section 107(c)(1)-(4), 15 U.S.C. 3317(c)(1)-(4), which was the gas Congress believed to be most in need of immediate production incentives (see 124 Cong. Rec. 28633 (1978) (Sen. Jackson)). Next, and most important for these cases, pursuant to Section 121(a), 15 U.S.C. 3331(a), price ceilings were eliminated on January 1, 1985, for certain of the incentive-priced gas qualifying under Sections 102 and 103 (“new” gas) and under Sections 105 and 106(b) (“old” intrastate gas), 15 U.S.C. 3312, 3313, 3315, 3316(b).<sup>8</sup> Finally, pursuant to Section 121(c), 15 U.S.C. 3331(c), certain other “new” Section 103 gas was deregulated on July 1, 1987.<sup>9</sup>

<sup>7</sup> A “stripper” well is one that produces 60 Mcf or less per day. See NGPA § 108(b), 15 U.S.C. 3318(b); NGPA § 2(29), 15 U.S.C. 3301(29) (defining “Mcf”).

<sup>8</sup> Certain “old” intrastate gas covered by Section 105 continues to be subject to price ceilings. See NGPA § 121(e), 15 U.S.C. 3331(e).

<sup>9</sup> Section 121(a), 15 U.S.C. 3331(a), states: “Subject to the reimposition of price controls as provided in section 122, the provisions of subtitle A respecting the maximum lawful price for the first sale of

Some gas, including "old" interstate gas, is never deregulated under the NGPA. Most notably for purposes of these cases, certain "high-cost" gas (§ 107(c)(5), 15 U.S.C. 3317(c)(5)) and "stripper well" gas (§ 108, 15 U.S.C. 3318) remains subject to price ceilings. In addition, the deregulation process established by Section 121 could have been delayed. Section 122, 15 U.S.C. 3332, gives the President and Congress an option for a one-time 18-month reimposition of price controls. That option expired on June 30, 1987, without having been invoked.

4. The categories defined by the provisions of Subtitle A overlap: substantial quantities of natural gas can qualify simultaneously under more than one provision. What is important for these cases is that, in addition to the overlap of several regulated categories, there is overlap between categories that remain subject to price ceilings (regulated gas) and categories that are free from any ceiling (deregulated gas). For example, the categories defined by Sections 107(c)(5) and 108, 15 U.S.C. 3317(c)(5), 3318 (certain high-cost natural gas and stripper-well gas), which remain subject to price ceilings, overlap significantly with the new-gas categories defined by Sections 102 and 103, 15 U.S.C. 3312, 3313, which are now deregulated. See Pet. App. 43a, 73a.<sup>10</sup>

each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985 \* \* \*." Subsections (b) and (c) are worded in similar fashion.

Subsection (d) is not relevant to these cases. Subsection (e) places a ceiling on certain gas (§ 105(b)(3), 15 U.S.C. 3315(b)(3)) that otherwise would be deregulated under Subsection (a). See note 32, *infra*.

<sup>10</sup> Pursuant to NGPA § 503, 15 U.S.C. 3413, producers must obtain rulings from certain state or federal "jurisdictional" agencies, subject to Commission review, in order to "qualify" their gas for sale in particular categories. Obtaining two qualifications is permitted. See 124 Cong. Rec. 38364 (1978) (explanatory statement on conference bill by Reps. Dingell, Staggers, Ashley, Eckhardt, and Wilson).

The Commission's regulations implementing the Section 503 requirement (18 C.F.R. Pt. 274) designate different jurisdictional

Recognizing that the Subtitle A categories overlap, Congress included in the NGPA a provision addressed to the general question of gas qualifying in more than one category. Section 101(b), 15 U.S.C. 3311(b), sets forth "Rules of general application." Section 101(b)(5) states:

Sales qualifying under more than one provision. — If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.<sup>11</sup>

#### B. The Commission's Rulings

As the principal deregulation date (January 1, 1985) approached, the Commission found it necessary to consider the proper treatment of gas that is qualified for both regulated and deregulated treatment. At the time the NGPA was enacted in 1978, Congress—indeed, virtually all participants in the legislative process—assumed that market prices would be higher than the statutory ceilings. See Pet. App. 22a-23a. It was, accordingly, also clearly assumed that producers would prefer deregulated treat-

agencies for gas produced from wells on the Outer Continental Shelf, on federal lands within a state, and on other lands within a state (18 C.F.R. 274.501). The regulations also set forth rules governing the filings producers must make with the jurisdictional agencies, and those rules vary according to the designation sought by the producer (18 C.F.R. 274.201-274.208).

<sup>11</sup> The Conference Report explains (H.R. Conf. Rep. 95-1752, *supra*, at 74):

The conference agreement provides that if natural gas qualifies under more than one price category, the provisions [*sic*] that permit the seller to obtain the highest price applies. If a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503.

ment to the ceilings set in the statute. By the end of 1984, market prices had fallen drastically, and the 1978 assumptions about producer preferences had been reversed. See *ibid.* Consequently, many producers preferred regulated to deregulated treatment for gas that might qualify for both. See *id.* at 73a-78a.<sup>12</sup>

In September 1984, the Commission proposed a regulation to determine the legal treatment of gas that is qualified for both deregulated and regulated treatment (dual-qualified regulated-deregulated gas).<sup>13</sup> Pet. App. 43a-45a. After receipt of comments, the Commission, in November 1984, issued a final rule establishing that, as of

<sup>12</sup> Many producers have contracts that fix the price of their gas far into the future, often providing alternative prices depending on the regulatory classification of the gas and leaving it up to government action (statute, regulation, order) to determine the classification of the gas. The price fixed for regulated gas is commonly at or near the maximum lawful price. By contrast, the price for gas treated as not subject to a price ceiling is typically based on market prices. See D. Zillman & L. Lattman, *Energy Law* 533 (1983) (contract provisions "often allow prices to increase to match the highest price paid for gas in the area or to return the highest price allowed by government regulation"). As a result, when deregulated prices are below the statutory ceilings, many producers wish to have their gas treated as falling within one of the still-regulated categories, so that they can collect a higher contract price.

<sup>13</sup> The Commission did not address itself to all gas that could conceivably be qualified for sale in a particular category by the relevant state or federal jurisdictional agency. Rather, of gas that requires agency qualification for sale in a particular category, the Commission addressed only gas that actually is qualified in multiple categories by the relevant agency. The Commission also considered certain deregulated gas that need not receive an agency qualification. See 18 C.F.R. 270.208, referring to 18 C.F.R. 272.103(a), which defines deregulated gas to include only gas actually qualified as such by the relevant jurisdictional agency and certain "old" intrastate gas, which does not require agency qualification.

January 1, 1985, gas that is qualified for a category not subject to any price ceiling would be treated as deregulated and could be sold at any price the market would bear, even if the gas is also qualified for one of the categories still subject to statutory price ceilings. *Id.* at 73a-82a; see page 2, *supra* (quoting rule, 18 C.F.R. 270.208). Noting that market prices were then below statutory ceiling prices, that "Congress may not have anticipated such a situation" (Pet. App. 75a), and that many producers would therefore prefer to remain subject to price regulation, the Commission construed the NGPA to mandate deregulation.<sup>14</sup>

The Commission based this conclusion, first, on Section 121 of the NGPA, 15 U.S.C. 3331, which by its terms mandates the removal of Subtitle A's price ceilings for the specified categories of natural gas. The Commission read the provision to embody Congress's mandate to "phase from regulated ceiling prices in the short term to market clearing prices in the long term" (Pet. App. 76a). See *id.* at 75a-77a. The Commission pointed out (*id.* at 74a; see also *id.* at 43a) that "the overall scheme envisioned by Congress when it enacted the NGPA [was] to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987."

The Commission likewise construed Section 101(b)(5), 15 U.S.C. 3311(b)(5), to require deregulated treatment of gas that falls under both a provision setting a ceiling price and one eliminating any legal ceiling price (Pet. App. 78a-79a).<sup>15</sup> The Commission concluded that Section

<sup>14</sup> The Commission noted that, in 1979 and 1980, when market conditions were different, several producers, including some of respondents, argued in favor of the conclusion adopted by the Commission here. Pet. App. 74a & n.10.

<sup>15</sup> The Commission stated that the provision was "helpful, but not dispositive" of the issue (Pet. App. 78a).

101(b)(5), in declaring applicable whichever of the competing provisions "could result in the highest price," means that "the deregulated price, which always *could* result in a price *higher* than a regulated price, prevails" because "there always exists at least the potential for the parties to negotiate a contract above the old regulated ceiling price" (Pet. App. 78a-79a (emphasis in original)). The Commission further explained on rehearing (*id.* at 111a (footnote omitted; emphasis in original)): "Without question, a deregulated price *could* always result in a price higher than a regulated price which is subject to a ceiling price; whether the *contract* allows the producer to collect a price higher than regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA."

In addition to, and in the course of explaining, its ruling on the treatment of dual-qualified regulated-deregulated gas, the Commission specifically addressed itself to the proper treatment of certain so-called "new tight formation" gas eligible for special high-cost-gas pricing under Section 107(c)(5), 15 U.S.C. 3317(c)(5). Except for gas from certain old Outer Continental Shelf leases (see § 102(d), 15 U.S.C. 3312(d)),<sup>16</sup> "new tight formation" gas, under the Commission's defining regulation (18 C.F.R. 271.703(b)), "is new natural gas, (as defined in section 102(c)), \* \* \* or gas produced through a new onshore production well (as defined in section 103(c))." Moreover, as the Commission pointed out (Pet. App. 81a-82a), "to qualify as new tight-formation gas under section 107(c)(5), a producer must file the same information, in addition to other information, that would be filed to qualify as a section 102 or 103 determination" (see 18 C.F.R. 274.205(e)(1)(i)(A) and (B)). Because a determination that a particular quantity of gas qualifies as new tight formation gas under Section 107(c)(5) therefore necessarily includes a determination that it meets the requirements of

<sup>16</sup> The Commission did not address such gas in this proceeding.

Section 102 or 103, the Commission ruled that a state or federal jurisdictional agency's qualification of gas as new tight formation gas is automatically a qualification under Section 102 or 103, even if the state or federal jurisdictional agency does not expressly style its ruling as such. See Pet. App. 81a-82a, 114a-116a. Under Section 121(a), 15 U.S.C. 3331(a), therefore, such gas was deregulated on January 1, 1985. Pet. App. 82a, 116a.

### C. The Court of Appeals' Decision

On petitions for review filed by numerous producers under Section 506 of the NGPA, 15 U.S.C. 3416, the court of appeals rejected the Commission's interpretation of Sections 101(b)(5) and 121, 15 U.S.C. 3311(b)(5), 3331. Pet. App. 1a-24a. The court first concluded that Section 121 is ambiguous, because, although it commands the elimination of price ceilings for the listed categories of natural gas, it does not explicitly address the subject of deregulated gas that also qualifies for a regulated category (Pet. App. 10a-11a). The court then stated that, despite the ambiguity, it could not defer to the Commission's interpretation, as it ordinarily would, because "Congress anticipated precisely this question in § 101(b)(5)" (Pet. App. 11a), and the Commission's ruling was contrary to the "unambiguous language" of that provision (*id.* at 13a).

After concluding that Section 101(b)(5) applies to all dual-qualified gas, even if one of the overlapping categories is deregulated,<sup>17</sup> the court held that Section

<sup>17</sup> The court reasoned that Section 101(b)(5), in using the word "exemption" when referring to provisions "providing for any maximum lawful price or for any exemption from such a price," applies to statutory provisions declaring gas prices deregulated. The court rejected the suggestion that the term "exemption" applies only to the provisions (§§ 104(b)(2), 106(c), 109(b)(2), 15 U.S.C. 3314(b)(2), 3316(c), 3319(b)(2)) that grant the Commission authority to set special "just and reasonable" ceilings higher than statutory ceilings for par-

101(b)(5) expressly and unambiguously gives producers the right to choose, at any particular moment, whatever category, regulated or deregulated, provides the highest price under their contracts. Pet. App. 16a-17a; *id.* at 30a (modification on petitions for rehearing). The court rejected the Commission's construction of the "could result" language of Section 101(b)(5), reasoning that, while "the price of deregulated natural gas in an open market 'could' theoretically reach infinity" (*id.* at 15a), at least certain price ceilings for regulated gas similarly "could" rise without limit.<sup>18</sup> It stated that the Commission's reading of Section 101(b)(5) "considers only the theoretical possibilities [and] renders § 101(b)(5) meaningless" (Pet. App. 16a). The court concluded that Section 101(b)(5) "requires a comparison of the applicable price for each category at a particular moment" based on producers' actual contracts, rather than a comparison of ceiling prices, if any, under the applicable provisions (Pet. App. 16a). Under Section 101(b)(5), then, the highest price governs (Pet. App. 16a-17a).

In support of that conclusion, the court indicated that it read the NGPA, informed by several congressional floor statements, as granting a producer the right to "select the category or categories for which he or she desires to qualify particular gas" (Pet. App. 19a). See *id.* at 18a-19a (citing 124 Cong. Rec. 29109 (1978) (Sen. Jackson); *id.* at

particular categories. The court pointed out that another of the "[r]ules of general application"—namely, Section 101(b)(9), 15 U.S.C. 3311(b)(9)—uses "exempted" and "exemption" to refer to provisions that deregulate gas prices (Pet. App. 14a-15a).

<sup>18</sup> Observing that the Commission could set price ceilings at "just and reasonable" rates under certain regulated-price provisions (§§ 104(b)(2), 106(c), 109(b)(2), 15 U.S.C. 3314(b)(2), 3316(c), 3319(b)(2)) and that the Subtitle A ceiling prices generally rise with inflation, the court reasoned: "The price of regulated gas is therefore certain to rise, and is capable of reaching an indefinite 'just and reasonable' rate." Pet. App. 15a-16a.

38363-38364 (Rep. Dingell)). This principle of producer choice of what categories to qualify gas in, the court reasoned, is inconsistent with the Commission's conclusion that a producer cannot choose a regulated category for gas that is already qualified for a deregulated category. The court also cited this principle as the basis for rejecting the Commission's ruling that most "new tight formation" gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313, and hence deregulated. Pet. App. 18a-19a. Even if such gas in fact meets the requirements of Section 102(c) or 103, the court ruled, producers are entitled to "a choice as to which category or categories for which they seek to qualify particular gas" (Pet. App. 18a).<sup>19</sup>

The court rejected the Commission's reliance on phased deregulation as the overall plan of the NGPA. Phased deregulation is not the sole means chosen by Congress to achieve the ultimate statutory aim of ensuring adequate supplies at fair prices, the court stated (Pet. App. 20a). The court briefly mentioned a few statements from the NGPA's legislative history (*id.* at 21a-22a n.15), but it

<sup>19</sup> The court indicated its belief (Pet. App. 18a & n.12) that so-called "recompletion tight formation" gas is an exception to the rule that "new tight formation" gas always in fact meets the requirements under Section 102 or 103, 15 U.S.C. 3312, 3313. In fact, contrary to that suggestion (and to the same suggestion in our petition (at 10 n.15, 12 n.18)), "recompletion - tight formation" gas (18 C.F.R. 271.703(b)(3)) is not included within the definition of "new tight formation" gas (18 C.F.R. 271.703(b)(2)), so it does not present the suggested exception.

It is not clear whether the court of appeals understood the new tight formation gas issue as separate and distinct from the general dual-qualification issue. On considering petitions for rehearing, the court clarified (Pet. App. 30a) that its decision "does not interfere with FERC's continuing authority to modify the criteria that establish which types of gas qualify under § 107(c)(5)."

noted that the cited passages had “somewhat contradictory” implications (*ibid.*). The court also recognized that “Congress did not expect that natural gas prices would fall” and hence did not anticipate the situation presented to the Commission in 1984 and today – that of producers wishing to remain under regulation (*id.* at 22a-23a). The court of appeals further recognized that, under its view, Section 101(b)(5) “can have the unanticipated effect of operating as a price floor for producers” (Pet. App. 23a). Nevertheless, the court felt itself bound by “the intent of Congress as evidenced in the unambiguous language [of the NGPA]” (*id.* at 24a).

#### SUMMARY OF ARGUMENT

I. The court of appeals’ reading of Section 101(b)(5) of the NGPA is inconsistent with the language, policies, and history of the NGPA. The Commission’s reading of Section 101(b)(5) is correct and is entitled to deference.

A. Section 101(b)(5) declares that when a particular quantity of gas falls under two applicable NGPA pricing provisions, “the provision which could result in the highest price” shall apply. Read naturally, those words call for a simple comparison between the highest price permitted by one provision and the highest price permitted by the other: the higher the applicable ceiling, the higher the price that “could result” under the provision. All producers whose gas falls under both provisions are governed by the same higher-ceiling provision. When one of the applicable provisions sets no legal ceiling (*i.e.*, deregulates the price of the gas), that provision applies because it permits producers to contract to sell their gas unconstrained by any price ceilings.

Contrary to the court of appeals’ reading, Section 101(b)(5) does not call for a comparison of the prices that happen to be specified in particular producers’ contracts. The section makes no reference to contract prices; it deter-

mines which statutory “provision” applies in the case of overlap, based on the prices that “could result,” not on the prices that in fact result. Moreover, nothing in Section 101(b)(5) suggests that it contemplates, as the court of appeals’ reading does, that two producers with gas falling under the same two provisions could be subject to different NGPA pricing provisions, depending on their particular contract prices.

Reading Section 101(b)(5) as focusing on contract prices would be inconsistent with the approach to price regulation taken by the NGPA as a whole. The NGPA sets only ceiling prices and otherwise leaves the establishment of actual sale prices to private decision. Section 101(b)(5) should not be read, as the court of appeals read it, as an anomalous provision that is concerned with the private contract prices at which particular gas is sold, rather than merely determining what upper limit, if any, constrains the contract price.

B. The error of the court of appeals’ reading of Section 101(b)(5) is especially stark as it applies to gas that is qualified in both regulated and deregulated categories. The court’s ruling, by allowing producers to choose regulated treatment for gas that otherwise would be deregulated and sold at a lower price, substitutes a permanent producer-assistance policy for the policy of phased deregulation leading to market control of prices that Congress adopted in the NGPA.

In addition, the legislative history of the NGPA demonstrates unmistakably that Congress as a whole, and in fact every participant in the legislative process, would have rejected the suggestion that producers could receive higher prices than deregulation would afford them. Deregulation was the most favorable position toward producers that was even discussed. The result reached by the court of appeals thus lies outside the terms of the debate leading up to the NGPA’s enactment.

II. The court of appeals also erred in rejecting the Commission's ruling that most "new tight formation" gas is automatically qualified as deregulated gas under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313. The Commission has broad regulatory authority under the NGPA and, in particular, is empowered to define the categories of "high-cost" gas deserving of special pricing under Section 107(c)(5), 15 U.S.C. 3317(c)(5). The Commission's ruling on new tight formation gas is a reasonable means of enforcing the plain terms of its definition of such gas, which states that new tight formation gas "is" gas as defined in Section 102(c) or 103. Moreover, the Commission's ruling is the legal equivalent of a change in the definition of new tight formation gas so as to exclude gas qualifying under Section 102(c) or 103. Such a change of definition would serve the purpose of ensuring, consistent with the legislative history of the statute, that producers do not receive more favorable treatment than deregulation would afford them. The Commission's means of achieving precisely the same result should therefore be upheld.

#### ARGUMENT

##### I. THE COMMISSION CORRECTLY CONCLUDED THAT SECTION 101(b)(5) OF THE NGPA REQUIRES THE DEREGULATION OF NATURAL GAS THAT IS QUALIFIED FOR BOTH REGULATED AND DEREGULATED TREATMENT

The court of appeals held that Section 101(b)(5) of the NGPA permits a natural gas producer whose gas is qualified in more than one NGPA category to compare the prices its contracts allow it to charge at a given time for gas in each category and select the highest price. The court therefore rejected the conclusion of the Commission, the agency charged with administering the NGPA, that Section 101(b)(5) places such gas in whichever of the categories imposes the highest legal ceiling, without regard to individual producer contracts—so that, when one ap-

plicable category places no upper limit on the price a producer may charge, that category applies, and the gas is deregulated.<sup>20</sup> The court of appeals' rejection of the Commission's position is erroneous. It is contrary to the language of Section 101(b)(5), to the NGPA's general approach to regulation (which focuses on ceiling prices only, and not on producers' contract prices), to the statute's overall plan of phased deregulation, and to the legislative history, which precludes any reading of the NGPA, such as the court of appeals' reading, that would allow producers to charge higher-than-market prices.

##### A. When Gas Is Qualified Under Two NGPA Pricing Provisions, Section 101(b)(5) Determines Which Provision Is Applicable Based On A Comparison Of The Ceiling Prices, If Any, Set Under Those Provisions, Not A Comparison Of Particular Producers' Contract Prices

To begin, as one must, with the language of the statute (e.g., *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)), Section 101(b)(5) states that, when several NGPA provisions apply to a particular quantity of gas, "the provision which could result in the highest price shall be applicable." Although this may not be "a provision in which Congress' limpid prose puts an end to all dispute," that does not mean "that all interpretations are equally plausible" (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, No. 86-473 (Dec. 1, 1987), slip op. 6). Rather, like the provision at issue in *Gwaltney of Smithfield, Ltd.*, Section 101(b)(5) has a single "most natural reading."

That reading, as the Commission concluded, calls for a comparison of the maximum prices allowed by the several

<sup>20</sup> We do not renew the argument we made in the court of appeals that Section 101(b)(5) does not apply to dual-qualified regulated-deregulated gas. We note, however, that it is by no means clear that Congress specifically contemplated that the provision would apply to such gas.

provisions applicable to a given quantity of natural gas. If natural gas is subject to two or more provisions of the NGPA, the "provision which could result in the highest price" is the provision that, solely with reference to the limits imposed under the NGPA, permits the highest price. See also H.R. Conf. Rep. 95-1752, *supra*, at 74 ("the provisions that permit the seller to obtain the highest price"). In the case of gas falling under two provisions that set ceiling prices, the one with the higher ceiling applies—and does so for all producers whose gas falls under those two provisions. Where one of several applicable provisions sets a ceiling price and another declares that there is no such ceiling, the deregulating provision is the one that "could result" in the highest price.

The court of appeals rejected the Commission's view that Section 101(b)(5) calls for the comparison only of ceiling prices; the court did not dispute that, if that reading is correct, it requires that gas qualified in both a regulated and deregulated category be deregulated. In the court of appeals' view, Section 101(b)(5) in every case calls for a comparison, not of applicable statutory ceilings, but of the prices particular producers have included in their contracts.<sup>21</sup> That is so even for gas that falls under two provisions that set ceiling prices: in that case, under the court's reading, Section 101(b)(5) requires the comparison of particular producers' contract prices, not of the ceiling prices under the applicable provisions, and so Section 101(b)(5) could require the application of different provisions for different producers, depending on what prices each happens to have included in its contracts. This view is inconsistent with the language of Section 101(b)(5) and with the approach to price regulation taken by Title I of the NGPA

<sup>21</sup> See, e.g., Pet. App. 16a-17a n.11 (emphasis added) ("the *contractual* price for regulated gas in the regulated category is to be compared with the *contractual* price for deregulated gas in the deregulated category").

as a whole, and the Commission's view that Section 101(b)(5) focuses exclusively on ceiling prices is clearly the better reading.

1. There are in the language of Section 101(b)(5) itself several decisive pieces of evidence supporting the Commission's reading. First, Section 101(b)(5) expressly calls for a comparison, simply, of NGPA "provisions." The statute contains no hint that the called-for comparison requires any reference to "contracts" or any other fact outside the terms of the price-setting provisions. Nor does it contain any reference to particular "producers" or any other hint that, as the court of appeals would allow, the overlap of the same two provisions could be resolved differently for different producers. Rather, it requires the comparison of the highest prices legally permitted under each applicable provision, not the prices particular producers happened to have included in their contracts.

Contrary to the court of appeals' reading, the result of the Section 101(b)(5) comparison is not to determine the price a producer must charge. What is determined is simply "the provision" that "shall be applicable" (Section 101(b)(5)). As was explained in the "comprehensive explanatory statement" prepared by five House conferees (Reps. Staggers, Ashley, Eckhardt, Wilson, and Dingell) in urging the House to adopt the conference bill (124 Cong. Rec. 38363 (1978) (emphasis added)), "if more than one ceiling price rule appears applicable," "[w]hichever ceiling price could result in the highest price is the *applicable maximum* lawful price." Section 101(b)(5) determines only the applicable ceiling price, and it does so for all producers whose gas happens to fall under the same two provisions.

Congress's use of the statutory phrase "could result" confirms the irrelevance of producers' contract prices to the comparison called for by Section 101(b)(5). Especially in a statutory provision that does not refer to producers or

contracts, that phrase can only call for an inquiry into the range of prices that a particular provision of the NGPA permits producers to charge. The producer respondents, in their effort to support the court of appeals' interpretation, have had to rewrite the statute: they read it as making applicable the provision that "results" (Br. in Opp. 14), "actually results" (*id.* at 11), or "will result" (*id.* at 8, 16) in the highest price. But the statute requires application of the provision that "could result" in the highest price. If Congress had wished to require a comparison of contract prices, "Congress could have phrased its requirement in language" like that suggested by the producer respondents, but "it did not choose this readily available option" (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, slip op. 6). Accordingly, Section 101(b)(5) must be read as referring to the range of legally permitted possibilities, not as determining which of several contract prices a producer must actually charge.

2. The court of appeals mistakenly concluded that the Commission's interpretation of the phrase "provision which could result" somehow rendered Section 101(b)(5) "meaningless" (Pet. App. 15a-16a). The categories of natural gas defined in Subtitle A of the NGPA overlap one another, and a rule is therefore required to determine where to place gas that is qualified in more than one category. Section 101(b)(5) furnishes the needed rule in a single sentence, encompassing all cases of dual-qualified gas—gas that falls into two regulated categories (regulated-regulated gas) and gas that falls simultaneously into regulated and deregulated categories (regulated-deregulated gas). The Commission's interpretation of Section 101(b)(5), far from rendering the provision meaningless, construes it as precisely specifying which category applies in every case—for regulated-regulated gas, the category with the higher ceiling; for regulated-deregulated gas, the deregulated category. Although the result of the

required comparison is always the same for regulated-deregulated gas, that is obviously not so for the regulated-regulated case. Section 101(b)(5) thus fulfills a necessary role in the NGPA under the Commission's reading.

Contrary to what the court of appeals thought, the Commission in no way reads Section 101(b)(5) as referring only to "theoretical possibilities" (Pet. App. 16a). Section 101(b)(5) does not require a comparison of what prices a producer might "theoretically" be able to charge depending on market conditions, the statutory inflation adjustments over time, or whether the Commission exercises its power to set special "just and reasonable" rates (Pet. App. 15a-16a). Section 101(b)(5) is not concerned with any such hypothetical situations either at a particular moment or over an indefinite period. It is concerned only with what the NGPA permits at a particular moment. Under Section 101(b)(5), as the Commission reads it, if two provisions apply to a given quantity of gas, the one that leaves producers free to contract to sell their gas at the higher price governs.

3. The court of appeals' view is inconsistent not only with the language of Section 101(b)(5) but with the approach to price regulation taken by Title I of the NGPA as a whole. See, e.g., *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18-19 (1981) (citation omitted) (particular provision should be construed in light of "the provisions of the whole law"). Under the court of appeals' view, Section 101(b)(5) requires a comparison of the prices producers happened to include in their contracts, not simply of the ceilings applicable under the NGPA. But such a construction would be anomalous in a statute that otherwise deals only with the upper limit on any producer price.

As the Commission's view recognizes, the pricing provisions of Title I of the NGPA regulate only the maximum prices producers may charge and do not concern

themselves with producers' contract prices, as long as they do not exceed applicable legal ceilings. Thus, the price-regulation provisions of Subtitle A do not establish the prices that producers must charge; rather, in every provision, the statute is concerned solely with setting "maximum lawful prices" or "ceiling prices." Section 504(a), 15 U.S.C. 3414(a), reinforces what those statutory terms already make clear — that such prices are only upper limits, below which parties are free to set their prices: Section 504(a)(1) declares it unlawful "to sell natural gas at a first sale price in excess of any applicable maximum lawful price." The NGPA again underscores its exclusive concern with upper limits in Section 101(b)(9), 15 U.S.C. 3311(b)(9), which expressly declares that contract prices are enforceable as long as they are lower than any applicable statutory ceiling, and are always lawful if a price-deregulation provision applies.

Congress clearly sought to set only maximum prices and otherwise to leave the establishment of the prices producers would actually charge to private decision.<sup>22</sup> Indeed, in explaining Section 101(b)(9), the Conference Report states (H.R. Conf. Rep. 95-1752, *supra*, at 74): "The rule

<sup>22</sup> Congress's removal of ever-increasing amounts of natural gas from the reach of the Natural Gas Act (see NGPA § 601, 15 U.S.C. 3431) confirms this. For gas covered by the Natural Gas Act (NGA), producers must file their contract rates with the Commission and are forbidden to alter contract rates without complying with certain filing and waiting-period requirements; moreover, if the Commission finds a proposed rate unjust or unreasonable, the Commission fixes the actual rate. See NGA §§ 4, 5, 15 U.S.C. 717c, 717d; *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The NGPA rejected these restrictions on producers' right to alter contracts and, with respect to the increasing quantities of gas removed from NGA jurisdiction, specified that, as far as the NGPA was concerned and subject to their contractual commitments, producers may freely change the price at which they sell gas as long as they do not exceed NGPA ceilings.

for application of ceiling prices pertains to maximum lawful prices. All maximum lawful prices are ceiling prices only." The explanatory statement prepared by the House conferees urging adoption of the conference bill likewise emphasized that the NGPA would not establish contract prices as such, but only restrict how high they could go: "The rule set forth in section 101(b)(9) is that the legislation establishes *ceiling* prices" (124 Cong. Rec. 38364 (1978) (emphasis in original)).<sup>23</sup> The court of appeals' reading of Section 101(b)(5) as dealing with the actual prices producers' contracts permit them to charge would render it a glaring anomaly in a statute otherwise pervasively concerned only with ceiling prices.

<sup>23</sup> In Section 105, 15 U.S.C. 3315, which applies to gas sold under intrastate contracts pre-dating the NGPA (or their successors), the statutory limit happens to depend on the contract terms. By its terms, however, the provision only sets a "maximum lawful price." Moreover, the provision, addressed to the distinctive transition problems of previously unregulated intrastate contracts' being brought under federal regulation, is clearly exceptional in the context of the NGPA. In any event, the key House conferees, recognizing that the coincidence of ceiling and contract prices is exceptional, stressed that the statute did not purport to address contract prices as such and that any interference with contracts was to be minimized: "The FERC is intended to play an enforcement role with respect to the ceiling prices, not with respect to enforcement of private contracts per se. \* \* \* Of course, in some cases, for example under section 105, the statutory ceiling prices and contract prices will coincide. In those cases FERC's enforcement responsibilities under this legislation may require an inquiry regarding the meaning of contractual provisions. This inquiry is essential if FERC is to enforce the ceiling price where that price is based upon a contract between private parties. Nevertheless, it is contemplated that FERC's implementation of the bill will be accomplished with minimal interference with contractual relationships." 124 Cong. Rec. 38364 (1978).

**B. The Overall Scheme And History Of The NGPA Preclude Permitting Producers To Select Regulated Treatment At A Higher Price For Gas That Is Qualified For Deregulated Treatment At A Lower Price**

The error of the court of appeals' reading of Section 101(b)(5) is made especially clear by the results it produces when applied to gas that is qualified for both regulated and deregulated treatment. Under the court's reading, a producer could repeatedly switch back and forth between regulated and deregulated categories, perhaps daily, as the contract prices in those categories change with time and market conditions. A producer not only could return deregulated gas to regulated status but also could obtain a price higher than the deregulated (market) price. Such results would be contrary to the overall scheme Congress enacted in the NGPA and would afford producers more favorable treatment than anyone in Congress urged or contemplated, so much so as to be wholly outside the terms of the debate that led to the NGPA's enactment.

1. The clear overall scheme of the NGPA is one of "[p]hased deregulation" (124 Cong. Rec. 38361 (1978) (Rep. Dingell); *id.* at 29659 (Sen. Percy) ("the phased deregulation schedule \* \* \* really is at the heart of this bill")). As shown by Section 601, 15 U.S.C. 3431, with its removal of increasing amounts of gas from the Commission's jurisdiction under the Natural Gas Act, and by Section 121, 15 U.S.C. 3331, with its three-stage plan for the elimination of price ceilings, the Act contemplates a transition to deregulation for an ever-increasing portion of the natural gas sold in this country (as "old" gas is replaced by "new" gas). The intended transition is reflected as well in Section 122, 15 U.S.C. 3332, which establishes only one method to call off deregulation (action by the President or Congress), and then only temporarily and only once. As the Conference Report states, Title I of the NGPA provides for the eventual "deregulation of most categories of

natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68). See also 124 Cong. Rec. 28634 (1978) (Sen. Jackson) ("It is a phased deregulation bill which, in 1985, if it does not work, the Congress and the President retain the opportunity to continue price regulations for 18 months, if necessary."); *id.* at 28642 (Sen. Melcher) (bill "will work up gradually to a point of deregulation"), 28645 (Sen. Pearsor.) (bill "provides the process which will lead us ultimately to the deregulation of new natural gas pricing"), 28884 (Sen. Hart) (bill "eventually deregulates the price of natural gas"), 28886 (Sen. Hansen) (bill "says we will have deregulation 7 years away").

The court of appeals' reading of Section 101(b)(5) is inconsistent with this basic plan for the future of natural gas regulation. The court of appeals would permit a producer to return deregulated gas to regulated status. It would also permit producers to switch back and forth between deregulated and regulated status, with no apparent limitation, as market prices rise or fall.<sup>24</sup> Nothing in the NGPA itself or in the legislative history of the Act contemplates either the peculiar system of (perhaps daily) category changes or the return to regulation of gas that has once been released from price regulation. To the contrary, such results would interfere with the gradual substitution of market controls for regulatory controls that Congress envisioned.

Under the court of appeals' reading, the future of natural gas regulation would follow a policy quite different from the deregulation policy established by Congress. The court of appeals' decision establishes a uniform and permanent producer-assistance policy, always affording producers the highest possible price, even when

<sup>24</sup> The potential for return of deregulated gas to regulated status is a continuing one, because some deregulated "new" gas (under §§ 102 and 103, 15 U.S.C. 3312, 3313) will always become regulated "stripper well" gas (under § 108, 15 U.S.C. 3318) as the well diminishes in production.

market forces set a lower price. But while the (mostly) temporary incentive-price provisions of the NGPA certainly were intended to spur production, the deregulation policy that has now been phased-in for most categories of gas—like any system for allowing market forces to determine price—is not intended single-mindedly to favor producers or production.

The NGPA deregulation policy resulted from Congress's belief, as this Court recognized in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. at 424 (footnote omitted), that "direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments." To the extent that Congress deregulated "particular aspects of the first sale of gas, it did so because [after the specified phase-in periods] it wanted to leave determination of supply and first-sale price to the market" (*id.* at 422). Allowing "long-term adjustments" in supply and demand to be made by the operation of market forces is not a policy that, in intent or effect, uniformly favors producers or increases production.

A market policy always carries the possibility, as one of its natural consequences, that prices and production may decrease at particular times—for example, as the costs diminish for alternative fuels such as oil and coal. Indeed, proponents of deregulation in Congress made just this point in arguing, in response to their opponents' principal contention, that deregulation would not result in excessively high prices or revenues for producers. See, e.g., 123 Cong. Rec. 26455 (1977) (Rep. Stockman); *id.* at 29783 (Sen. Hansen), 29784 (Sen. Bartlett), 29931 (Sen. Johnston), 31252 (Sen. Stevens); 124 Cong. Rec. 28877 (1978) (Sen. Weicker) ("the price under total deregulation in a free market, can go down if the supply is too great"); *id.* at 28882 (Sen. Bumpers), 29103 (Sen. Bellmon).<sup>25</sup>

<sup>25</sup> Senator Stevens explained (123 Cong. Rec. 31252 (1977)): "The argument for deregulation is straightforward and simple. Market

This obvious aspect of the working of a policy of deregulation, as applied in circumstances like those prevailing in the market today, is simply incompatible with the producer-assistance policy adopted by the court of appeals.

2. The producer-assistance policy that results from the court of appeals' view of Section 101(b)(5) is not merely incompatible with the plan of phased deregulation that Congress adopted. By allowing producers to receive higher prices than market forces would establish, the court of appeals has read the NGPA as affording producers more favorable treatment than any participant in the debate leading up to the enactment of the NGPA supported. It is inconceivable that the Congress that enacted the NGPA would have passed a statute that enabled producers to receive higher than market prices.

As we demonstrated above (pages 4-7, *supra*), the natural gas pricing scheme adopted by Congress was a compromise between "two strong, but divergent, responses to the natural gas shortage" (*Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. at 331), with one predominating by a slim margin in the Senate, the other by a slim margin in the House. See also H.R. Conf. Rep. 95-1752, *supra*, at 68 ("compromise"); 124 Cong. Rec. 38361 (1978) (Rep. Dingell) ("compromise"); *id.* at

---

prices for natural gas should prevail for the same reason the market sets most prices in our society. Producers have an incentive to find the lowest cost supplies and sell to all consumers who find the product at the market price more valuable than their alternatives. \* \* \* If demand slackens, producers will drop their higher cost production, and restrain prices, until balance is again achieved.

"We argue that the same thing will happen with natural gas. With deregulation, prices may well rise above the controlled levels. More supplies will be produced. Consumers who have lower cost alternatives will switch, thus freeing additional supplies, and helping to moderate the price rise."

29404 (Sen. Byrd) ("compromise").<sup>26</sup> In both the 94th and 95th Congresses, the debate over natural gas legislation took place along a spectrum—at one end were those supporting some form of deregulation; at the other were those supporting the extension into intrastate markets of some form of federal price ceilings. See H.R. Rep. 95-543, *supra*, at 391-392; 124 Cong. Rec. 28634-28635 (1978) (Sen. Jackson); 123 Cong. Rec. 30741-30742 (1977) (Congressional Research Service memorandum). The first group, which predominated in the Senate and was led by Senators from the gas-producing states, reflected a range of views about when and what kinds of gas should be deregulated. See, e.g., 121 Cong. Rec. 30735-30737 (1975) (Sens. Bartlett and Long); *id.* at 30739 (Sen. Taft), 30908 (Sen. Bentsen), 30914 (Sen. Tunney), 31250 (Sens. Packwood and Scott); 123 Cong. Rec. 25897 (1977) (Rep. Anderson); *id.* at 25936 (Rep. Hightower), 25938-25940 (Rep. Kemp), 29781 (Sen. Hansen), 29927 (Sen. Bartlett), 29784-29786 (Sen. Pearson), 30186-30187 (Sen. Bentsen); 124 Cong. Rec. 28635 (1978) (Sen. Bartlett); *id.* at 28881 (Sen. Weicker). The second group, which predominated in the House, reflected a range of views about what changes, if any, should be made in the level of federal price ceilings. See, e.g., 121 Cong. Rec. 30902-30903 (1975) (Sen. Hollings); 122 Cong. Rec. 2387-2388 (1976) (Rep. Smith);

<sup>26</sup> The Conference Committee adopted elements of both the Senate and House bills, bringing intrastate gas under control (as the House but not the Senate proposed), phasing in deregulation of "most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68) (as the Senate but not the House proposed), but lengthening the periods proposed by the Senate for the phasing in of deregulation. On the compromise nature of the bill, see Allison, *Natural Gas Pricing: The Eternal Debate*, 37 Baylor L. Rev. 1, 37 (1985); Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63, 89 (1982); Moody & Garten, *The Natural Gas Policy Act of 1978: Analysis and Overview*, 25 Rocky Mtn. Min. L. Inst. 2-39, 40 (1979).

H.R. Rep. 95-543, *supra*, at 391-397; 123 Cong. Rec. 25894 (1977) (Rep. Ashley); *id.* at 25898 (Rep. Dingell); S. Rep. 95-436, *supra*, at 2-5, 15-16, 42-43 (Sen. Abourezk), 45-46 (Sen. Bumpers), 47-49 (Sen. Metzenbaum); 123 Cong. Rec. 29925-29926 (1977) (Sen. Metzenbaum); 124 Cong. Rec. 28637 (1978) (Sen. Metzenbaum); *id.* at 28648 (Sen. Proxmire).

No one among those supporting deregulation, however, even remotely suggested that producers should receive higher than market prices. Indeed, such a suggestion would have been contrary to their key argument that the market was the right mechanism to determine prices and to induce sufficient production. See, e.g., 121 Cong. Rec. 30735-30737 (1975) (Sens. Bartlett and Long); *id.* at 30908 (Sen. Bentsen), 31223 (Sen. Fannin), 31250 (Sen. Packwood), 31358-31359 (Sen. Stevens), 31988-31992 (Sen. Gravel); 123 Cong. Rec. 25923 (1977) (Rep. Edwards); *id.* at 25926 (Rep. Krueger), 25932 (Rep. Ichord), 26458 (Rep. Symms), 26460 (Rep. Archer), 26467 (Rep. Watkins), 29781-29782 (Sen. Hansen), 30373 (Sen. Pearson), 30388-30390 (Sen. Percy), 31252 (Sen. Stevens), 31774-31775 (Sen. Goldwater). Those on the other side of the debate would have found such a suggestion even more objectionable. They opposed deregulation, and sought to impose price ceilings, because they believed that deregulation itself would be too favorable to producers—would create "windfall profits" and raise prices excessively. See, e.g., 121 Cong. Rec. 31215-31218 (1975) (Sen. Hollings); *id.* at 31803 (Sen. Stevenson); H.R. Rep. 95-543, *supra*, at 391; 123 Cong. Rec. 25894 (1977) (Rep. Ashley); *id.* at 25916 (Rep. Ottinger), 26453 (Rep. Ashley), 29780 (Sen. Jackson); S. Rep. 95-436, *supra*, at 20, 39 (Sen. Jackson), 45-46 (Sen. Bumpers), 47-49 (Sen. Metzenbaum). The proponents of deregulation took pains to respond to that critical objection by arguing that deregulation would, while raising prices, not do so excessively and, indeed,

would eventually moderate prices by imposing market discipline on gas producers. See sources cited page 30, *supra*; see also 121 Cong. Rec. 30930 (1975) (Sen. Fannin); 123 Cong. Rec. 26453 (1977) (Rep. Brown); *id.* at 26457 (Rep. Ketchum), 29783 (Sen. Hansen), 29784 (Sen. Bartlett), 30188 (Sen. Bentsen), 30379 (Sen. Domenici), 31251 (Sen. Stevens), 31572 (Sen. Weicker). Finally, central to the arguments made by the supporters of the conference agreement were the beliefs that the agreement would not result in windfall profits and that the gradually increasing ceiling prices established by the bill would cushion the shock of the eventual jump up to still-higher deregulated prices. See, e.g., 124 Cong. Rec. 28632 (1978) (Sen. Jackson); *id.* at 28642 (Sen. Melcher), 28883-28884 (Sen. Hart), 38361-38362 (Rep. Dingell).<sup>27</sup>

In these circumstances, it would have been unthinkable to suggest that producers should receive more than market forces would give them. Such higher-than-market prices would almost by definition have been deemed just the sort of windfall profits that no one in the debate suggested producers deserved. And the history of the NGPA makes crystal clear that all participants in the legislative process understood—as Senator Jackson, the Senate floor manager, said in explaining why the “very important” high-cost gas under Section 107(c)(1)-(4), 15 U.S.C. 3317(c)(1)-(4), was deregulated within one year—that deregulation provided “the maximum economic incentive” (124 Cong. Rec. 28633 (1978)) that anyone in Congress was considering. See also 124 Cong. Rec. 38361 (1978) (Rep. Dingell) (“The deregulation provisions provide the incentives required for producers.”).

<sup>27</sup> Representative Dingell, the floor manager of the conference bill in the House, explained that, although he had opposed immediate deregulation for fear of its harsh consequences to consumers and potential for windfall profits, “[p]hased deregulation as set forth in the conference report avoids both of these objectionable results” (124 Cong. Rec. 38361 (1978)).

In short, deregulation was the most favorable position for producers even being discussed.<sup>28</sup> To permit producers higher than market prices, as would the court of appeals’ ruling, would be to adopt a position that lies wholly outside the spectrum within which the debate in Congress took place. That reading of the Act is one that not only Congress as a whole but, in fact, both sides of the debate would have rejected.

3. The court of appeals erred in finding (Pet. App. 18a-22a) that its ruling was supported by a congressional commitment to the principle of producer choice. The court read the NGPA as granting producers an indefeasible right to choose, from among the available pricing categories, those in which they would seek qualification from the relevant state or federal jurisdictional agency. But that proposition, which we believe is incorrect<sup>29</sup> and is of only minor importance,<sup>30</sup> is irrelevant to the Commis-

<sup>28</sup> Several of the opponents of deregulation expressly identified the deregulation side of the debate as representing the producers’ interests. See, e.g., 121 Cong. Rec. 31211 (1975) (Sen. Hollings) (producers sought deregulation in 1950 and 1956 and are now trying again); 123 Cong. Rec. 26482 (1977) (Speaker O’Neill).

<sup>29</sup> In our view, nothing in Section 503, 15 U.S.C. 3413, which provides for administrative determinations of the proper category of natural gas, grants producers the indefeasible right to select one of two applicable categories. The authority of the Commission to promulgate regulations under Sections 501(a) and (b) and 503(b), 15 U.S.C. 3411(a) and (b), 3413(b), should encompass the authority to direct that gas that in fact falls into a deregulated as well as a regulated category be treated as deregulated. Such an action would be consistent with the overall aims and the specific history of the NGPA, as discussed above, and would also serve the purpose of simplifying the administration of the Act, which was the subject of considerable congressional concern. See sources cited at pages 37-38, *infra*.

<sup>30</sup> If this Court reverses the Tenth Circuit’s decision overturning the Commission’s ruling that most new tight formation gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102 or 103, 15 U.S.C. 3312, 3313, it should be a rare case where

sion's dual-qualification ruling. The Commission's ruling applies only to gas that has already been dually qualified in both regulated and deregulated categories. Whether that ruling is correct presents a quite different question from whether producers have an unqualified right to decline in the first place to seek or accept jurisdictional-agency qualification in particular categories. However that question is answered, the NGPA embodies no principle of producer choice that permits a producer to place gas that is already qualified for deregulated treatment into a regulated category with a higher than market price.

The language of Section 101(b)(5) itself is contrary to the suggested principle, since that provision declares what price provisions govern; it does not give producers any choice in the matter. Moreover, and perhaps most important, such a principle would give producers a more favorable position—enabling them to opt in and out of the operation of the market—than anyone in the legislative process contemplated (see pages 31-35, *supra*). And allowing producers, indefinitely into the future, to choose regulated pricing rather than market prices would be inconsistent with the congressional policy of phased deregulation.

The court of appeals pointed (Pet. App. 19a, 21a-22a, n.15) to several statements in the legislative history to support its conclusion. In fact, the legislative history does not

---

gas that qualifies for regulated status has not also been qualified for a deregulated status for which it is eligible. Aside from Section 107(c)(5) gas, most of which the Commission's rule would automatically qualify for deregulated status, the only regulated gas that presents a significant potential problem of overlap with deregulated gas is stripper-well gas qualified under Section 108, 15 U.S.C. 3318. Almost all such gas that could be qualified under Section 102 or 103, however, will in fact have been so qualified before the well's production diminishes and the gas becomes eligible for Section 108 status.

provide the necessary support. First, as the court of appeals recognized (*id.* at 21a n.15), the statements in the legislative history that address the subject of gas that could qualify for two different kinds of treatment point in opposite directions. Several statements might suggest an intent that dual-qualified regulated-deregulated gas would be deregulated.<sup>31</sup> Further, the two statements centrally relied on by the court of appeals—the explanatory statement of the key House conferees led by Representative Dingell (Pet. App. 19a, quoting 124 Cong. Rec. 38363-38364 (1978)) and the statement of Senator Jackson (Pet. App. 19a, quoting 124 Cong. Rec. 29109 (1978))—do not state that producers can opt out of a deregulated qualification they have already obtained. Rather, the statements are concerned with the wholly distinct issue (see pages 35-36, *supra*) of the awarding and seeking of qualifications in the first instance. Even on that issue, moreover, the statements are specifically addressed only to the repeatedly expressed concerns about the potential administrative burdens that the NGPA, because of its complexity, would place on the agencies that determine the classification of natural gas (124 Cong. Rec. 28651 (1978) (Sens. Proxmire and Abourezk); *id.* at 28875 (Sen. Weicker), 29386 (Sen. Reagle), 29665-29669 (Sen. Abourezk, and comments of FERC chairman), 30038 (Sen. Melcher, citing FERC staff analysis), 38352-38354

---

<sup>31</sup> Senator Bartlett stated (124 Cong. Rec. 31387 (1978)): "[I]n informal discussions on the floor it has been asserted that stripper wells are deregulated. This is true only to the extent that such wells are otherwise new wells and would be deregulated anyway." And the key House conferees, led by Representative Dingell, explained (124 Cong. Rec. 38364 (1978)) that obtaining two qualifications for new gas from a stripper well "would permit the producer to obtain stripper well pricing under section 108 prior to January 1, 1985, and deregulation as new gas thereafter." See Pet. App. 21a n.15.

(Rep. Anderson), 38355-38358 (FERC staff analysis)); and they merely affirm that it is up to producers to seek particular qualifications, so that the agencies have no statutory obligation to search through all possible classifications, demand all potentially relevant information from producers, and independently determine the proper category. Indeed, it is hard to imagine that Representative Dingell and Senator Jackson, both of whom came to the conference compromise from the side of the debate that opposed deregulation as too costly (123 Cong. Rec. 26454 (1977) (Rep. Dingell); 124 Cong. Rec. 38361 (1978) (Rep. Dingell); S. Rep. 95-436, *supra*, at 39 (Sen. Jackson); 123 Cong. Rec. 29780 (1977) (Sen. Jackson)), would have meant or been understood to suggest that producers could invoke the mechanisms of the NGPA to opt out of deregulation and to obtain higher than market prices.<sup>32</sup>

<sup>32</sup> The court of appeals also cited (Pet. App. 22a n.15) a statement in the Conference Report that "natural gas qualifying as gas produced from a natural gas stripper well \* \* \* [could be] sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract" (H.R. Conf. Rep. 95-1752, *supra*, at 83). That statement, however, is not an explanation of Section 101(b)(5) at all. It appears in the portion of the conference report that discusses Section 105, 15 U.S.C. 3315, and it explains a singular limitation on deregulation set by Section 121(e), 15 U.S.C. 3331(e), for certain Section 105 gas. Under Section 121(e), such gas, which would otherwise be deregulated under Section 121(a), 15 U.S.C. 3331(a), is instead subjected to a ceiling that limits certain price-escalation clauses in producers' contracts (see NGPA § 105(b)(3), 15 U.S.C. 3315(b)(3)). Accordingly, the statement cited by the court of appeals is in fact addressed to an overlap of two regulated categories (§ 108, 15 U.S.C. 3318, and § 105(b)(3), 15 U.S.C. 3315(b)(3)), not to the overlap of a regulated and a deregulated category. (The court of appeals discussed the operation of Sections 105(b)(3), 121(a), and 121(e) elsewhere in its opinion. See Pet. App. 25a-28a.)

Indeed, the provision that the Conference Report statement explains, Section 121(e), supports the Commission's ruling here. In that provision, as in Section 101(b)(5), Congress addressed itself to dual-

### C. Deference Is Due To The Commission's Construction Of The NGPA

For all of the above reasons, the court of appeals' decision is erroneous. It creates a bizarre system of natural gas regulation (permitting repeated transfers of natural gas in and out ~~the~~ regulation) that is contrary to the language, history, and overall scheme of the NGPA. That conclusion is compelled using the "traditional tools of statutory construction" (*INS v. Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 24-25), independent of any deference to the Commission.

Even if the statutory meaning were less than crystal clear, however, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the \* \* \* agency" that is entrusted with administration of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted). See also *Clarke v. Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Japan Whaling Ass'n v. American Cetacean Society*, No. 85-954 (June 30, 1986), slip op. 11; *Young v. Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-7. The Commission is entitled to deference in these cases because the NGPA entrusted the Commission with the "responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly" (*Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933)). See NGPA § 501, 15 U.S.C. 3411 (granting Commission broad power to carry out the provisions of the

qualified gas. And Congress specifically provided there that, whenever the regulated category (§ 105(b)(3)) overlapped with a deregulated category (§§ 102, 103, 107(c)(1)-(4), 15 U.S.C. 3312, 3313, 3317(c)(1)-(4)), the deregulated category would be applicable.

NGPA); H.R. Conf. Rep. 95-1752, *supra*, at 69, 116; *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. at 339. Deference is especially appropriate where, as here, there has been no inconsistency in the agency rulings and "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters" at issue (*United States v. Shimer*, 367 U.S. 374, 382 (1961)). See *INS v. Cardoza-Fonseca*, slip op. 23-26; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 837-843. Because the Commission's view that dual-qualified regulated-deregulated gas is deregulated under the NGPA is unquestionably reasonable,<sup>33</sup> it should be upheld.

## II. THE COMMISSION PROPERLY RULED THAT MOST NEW TIGHT FORMATION GAS IS AUTOMATICALLY QUALIFIED FOR DEREGULATED TREATMENT

The court of appeals overturned (Pet. App. 18a-19a) the Commission's ruling that most "new tight formation" gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313, and hence deregulated, even if the state or federal jurisdictional agency that awards the Section 107(c)(5) qualification does not expressly state that the gas is also being qualified under Section 102 or 103.

<sup>33</sup> Indeed, in comments filed in 1979 in a related rulemaking proceeding (a copy of which has been lodged with the clerk of this Court), respondent Phillips Petroleum Company, among other producers, interpreted the NGPA to require the same result as that reached by the Commission in this proceeding. It stated that Section 121 of the NGPA, 15 U.S.C. 3331, without regard to Section 101(b)(5), required deregulation for all gas in the listed categories, regardless of whether the gas also fell within a regulated category and regardless of whether the regulated or deregulated price was higher. See FERC, *Joint Comments of Indicated Producers B-11 to B-12* (Oct. 26, 1975). The same comments, we note, also adopted the Commission's position on the question of deregulation of new tight formation gas (*ibid.*).

The court of appeals reached this decision in the course of explaining its broader dual-qualification holding, without distinctly separating the Section 107(c)(5) issue in its discussion. Although the court later modified its initial opinion by expressly noting (Pet. App. 30a) that the Commission has authority to define what gas qualifies under Section 107(c)(5), the court of appeals erred in striking down the Commission's ruling on new tight formation gas.

The Commission has broad authority under Section 501, 15 U.S.C. 3411, "to issue rules and orders under the Act, and to perform any and all acts as it may find necessary or appropriate to carry out the provisions of [the] Act" (H.R. Conf. Rep. 95-1752, *supra*, at 116). That authority encompasses the power "to issue rules and orders necessary to prevent circumvention of the Act" (*ibid.*) as well as the power "to refine definitions of terms provided in the Act in a manner that is consistent with the definitions provided" (*id.* at 69) and to define additional terms (*id.* at 69, 116). See also 124 Cong. Rec. 29109 (1978) (Sen. Jackson). Also, under Section 503, 15 U.S.C. 3413, the Commission is charged with reviewing the qualification determinations of the jurisdictional agencies and is authorized (§ 503(a)(2), 15 U.S.C. 3413(a)(2)) to prescribe in what manner and with what substantiation such determinations must be presented for review. In addition, and more particularly, as the court of appeals recognized in modifying its decision, the Commission is granted the authority to determine what categories of gas "present extraordinary risks or costs" so as to deserve the special pricing of high-cost gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5).

The Commission's ruling on new tight formation gas is an eminently reasonable exercise of its regulatory authority. The definition of "new tight formation" gas states that, with the exception of certain Outer Continental Shelf gas, such gas "is" new gas under Section 102(c) or 103 (18

C.F.R. 271.703(b)). When a producer applies for qualification of certain gas under that definition, all the information required for Section 102 or 103 qualification must be supplied (18 C.F.R. 274.205(e)(1)(i)(A) and (B)), and a determination that the gas is new tight formation gas is necessarily a determination that the gas "is" Section 102 or 103 gas.<sup>34</sup> The Commission merely ruled that the jurisdictional agencies must give effect to that definition by announcing the necessarily implied designation under Section 102 or 103 when they announce the Section 107(c)(5) designation. This ruling reasonably serves to simplify the operation of the NGPA and to prevent circumvention of the statute and of the Commission's definitional rules properly implementing Section 107(c)(5).

Moreover, the ruling is in all relevant respects identical to a Commission decision simply to exclude from the definition of new tight formation gas under Section 107(c)(5) all gas that meets the requirements for qualification under Section 102 or 103. At least now that the latter categories have been deregulated, such a decision would be entirely proper. As we have explained (pages 31-35, *supra*), Congress understood deregulation to be "the maximum economic incentive" provided by the statute (124 Cong. Rec. 28633 (1978)) (Sen. Jackson, explaining Section 107(c)(1)-(4)). It would be, at a minimum, in tension with that understanding for the Commission to use its Section 107(c)(5) definitional authority to grant producers higher prices than market forces would justify. Because a change in the definition of new tight formation gas would accordingly be proper, as the court of appeals may have recognized in modifying its opinion, the Commission's

<sup>34</sup> Indeed, in order to be "new natural gas" under Section 102(c), 15 U.S.C. 3312(c), the gas must be "determined in accordance with section 503" (*ibid.*) by a jurisdictional agency to meet the specified requirements.

Section 107(c)(5) ruling in this proceeding should be upheld.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. AYER

*Acting Solicitor General\**

LOUIS R. COHEN

*Deputy Solicitor General*

RICHARD G. TARANTO

*Assistant to the Solicitor General*

CATHERINE C. COOK

*General Counsel*

JEROME M. FEIT

*Solicitor*

JOEL M. COCKRELL

JOHN H. CONWAY

*Attorneys*

*Federal Energy Regulatory Commission*

JANUARY 1988

\* The Solicitor General is disqualified in this case.

6  
No. 87-364

Supreme Court, U.S.

FILED

JAN 14 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1987

**PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, ET AL.,**

*Petitioners,*

v.

**MARTIN EXPLORATION MANAGEMENT  
COMPANY, ET AL.,**

*Respondents.*

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT**

**BRIEF FOR THE PETITIONERS**

RAYMOND N. SHIBLEY  
BRIAN D. O'NEILL  
LeBoeuf, Lamb, Leiby &  
McRae  
1333 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

*Counsel for Panhandle  
Eastern Pipeline Company*

FREDERICK MORING  
HERBERT J. MARTIN  
Crowell & Moring  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2505

*Counsel for Associated Gas  
Distributors*

RICHARD A. SOLOMON  
MARK N. MUTTERPERL  
Wilner & Scheiner  
Suite 300  
1200 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

*Counsel for The Public Service  
Commission of the State of  
New York*

TERENCE J. COLLINS  
ROBERT BALLENTINE  
P.O. Box 2511  
Houston, Texas 77252-2511

*Counsel for Tennessee Gas  
Pipeline Company*

January 14, 1988

58 PP

## QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission properly concluded that Section 121 of the Natural Gas Policy Act, 15 U.S.C. 3331, mandating deregulation of certain categories of gas, makes inapplicable to such gas all ceiling price provisions under Title I of that Act.<sup>1</sup>

<sup>1</sup>The parties and their alignment in the court of appeals are as follows:

*Petitioners:* Martin Exploration Management Company, Colorado Energy Corporation, Phillips Petroleum Company, Phillips Oil Company, Exxon Corporation, Shell OffShore, Inc., Shell Western E&P, Inc., Independent Oil & Gas Association of West Virginia, and Amoco Production Company.

*Respondent:* Federal Energy Regulatory Commission.

*Intervenors:* Arco Oil & Gas Company, Ohio Oil and Gas Association, Independent Oil and Gas Association of West Virginia, Gulf Oil Corporation, successor to Chevron U.S.A., Inc., Union Oil Company of California, Champlin Petroleum Company, Pennzoil Company, Pennzoil Oil & Gas, Inc., Pennzoil Producing Company, Placid Oil Company, Tennessee Gas Pipeline Company, a division of Tenneco, Pacific Gas & Electric Company, Amoco Production Company, Transok, Inc., Oklahoma Natural Gas Company, a division of Oneok, Inc., Associated Gas Distributors, Public Service Commission of the State of New York, Pacific Lighting Gas Supply Company, Southern California Gas Company, Consolidated Gas Transmission Corporation, Panhandle Eastern Pipe Line Company, Cities Service Oil and Gas Corporation, Grace Petroleum Corporation, Valero Transmission Company, BHP Petroleum Company, Inc., successor to Monsanto Oil Company, Texas Eastern Transmission Corporation, Transwestern Pipeline Company, United Gas

## TABLE OF CONTENTS

	Page
Question Presented .....	i
Opinions Below .....	1
Jurisdiction .....	2
Statutes and Regulations Involved .....	2
Statement .....	3
Summary of Argument .....	8
Argument:	
Section 121 of the Natural Gas Policy Act of 1978 Compels Deregulation For All Qualify- ing Gas, Including That Which Also Qualifies For Regulated Pricing Ceilings .....	9
A. The Plain Language of the NGPA And Its Legislative History Demonstrate That Regulated Prices Were Not Intended To Apply Once Gas Qualifies For Deregulation .....	9
B. The Purposes of the NGPA And FERC's Contemporaneous Interpretation Confirm That Regulated Prices Are Inapplicable To Dually-Qualified Gas .....	14
Conclusion .....	17
Addendum .....	1a

---

Pipe Line Company, United Texas Transmission  
Company, and Texas Gas Transmission Corpora-  
tion.

Pursuant to Rule 28, we include as an Addendum hereto a listing  
naming all parent companies, subsidiaries and affiliates of the corporate  
petitioners.

## TABLE OF AUTHORITIES

	Page
<i>Cases:</i>	
<i>American Tobacco Co. v. Patterson,</i> 456 U.S. 63 (1982) .....	15
<i>Board of Education v. Harris,</i> 444 U.S. 130 (1979) ....	16
<i>Chemical Mfrs. Assn. v. Natural Resources Defense</i> <i>Council, Inc.,</i> 467 U.S. 837 (1984) .....	10
<i>Chevron, U.S.A. Inc. v. Natural Resources Defense</i> <i>Council, Inc.,</i> 467 U.S. 116 (1985) .....	10, 13 16
<i>Church of the Holy Trinity v. United States,</i> 143 U.S. 457 (1892) .....	14
<i>Commissioner of Internal Revenue v. Engle,</i> 464 U.S. 206 (1984) .....	14
<i>Ford Motor Credit Co. v. Cenance,</i> 452 U.S. 155 (1981) .....	10
<i>Miller v. Youakim,</i> 440 U.S. 125 (1979) .....	16
<i>NLRB v. United Food &amp; Commercial Workers</i> <i>Union, Local 23,</i> 56 U.S.L.W. 4037 (U.S. Dec. 15, 1987) .....	13
<i>Norwegian Nitrogen Products Co. v. United</i> <i>States,</i> 288 U.S. 294 (1933) .....	16
<i>Pennzoil Co. v. FERC,</i> 645 F.2d 360 (5th Cir. 1981) cert. denied 454 U.S. 1142 (1982) .....	4
<i>Power Reactor Development Co. v. International</i> <i>Union of Electrical, Radio and Machine</i> <i>Workers,</i> 367 U.S. 396 (1961) .....	16
<i>Public Service Commission of the State of New</i> <i>York v. Mid-Louisiana Gas Co.,</i> 463 U.S. 319 (1983) .....	3, 4, 5

	Page
<b>Cases (continued):</b>	
<i>Transcontinental Gas Pipe Line Corp. v. State Oil &amp; Gas Board</i> , 474 U.S. 409 (1986) .....	3, 14, 15
<i>TVA v. Hill</i> , 437 U.S. 153 (1978) .....	10
<i>United States v. American Trucking Assns., Inc.</i> , 310 U.S. 534 (1940) .....	15
<i>United States v. Wise</i> , 370 U.S. 405 (1962) .....	14
<i>United Steelworkers of America v. Weber</i> , 443 U.S. 193 (1979) .....	14
<i>Young v. Community Nutrition Institute</i> , 476 U.S. 974 (1986) .....	16
<i>Zenith Radio Corp. v. United States</i> , 437 U.S. 443 (1978) .....	16
<b>Statutes and Regulations:</b>	
Natural Gas Act of 1938, 15 U.S.C. 717 <i>et seq.</i> .....	4
Natural Gas Policy Act of 1978, Tit. I,	
15 U.S.C. 3301 <i>et seq.</i> .....	2, 3, 10
§ 100, 15 U.S.C. 3301 .....	2, 13
§ 101(b)(5), 15 U.S.C. 3311(b)(5) .....	<i>passim</i>
§ 101(b)(9), 15 U.S.C. 3311(b)(9) .....	5
§ 102(c), 15 U.S.C. ....	11
§ 107(c)(5), 15 U.S.C. 3317(c)(5) .....	6
§ 108, 15 U.S.C. 3318 .....	5, 11, 12
§ 121, 15 U.S.C. 3331 .....	2, 5
18 C.F.R.	
Section 270.208 .....	3, 8, 9

	Page
<b>Miscellaneous:</b>	
124 Cong. Rec. (1978):	
P. 29659 .....	14
p. 38361 .....	14
p. 38363 .....	12
H.R. Conf. Rep. 95-1752, 95th Cong. 2d Sess. (1978) ..	3
Note: <i>Legislative History of the Natural Gas Policy Act: Title I</i> , 59 Tex. L. Rev.	
101 (1980) .....	15

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

---

No. 87-364

---

PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, *et al.*,

*Petitioners.*

v.

MARTIN EXPLORATION MANAGEMENT  
COMPANY, *et al.*,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT

---

BRIEF FOR THE PETITIONERS

---

**OPINIONS BELOW**

The opinion of the court of appeals (App. 1a-28a) is reported, as modified, at 813 F.2d 1059. The order of the court of appeals denying rehearing and modifying the initial panel opinion (App. 29a-31a) is unreported. The Federal Energy Regulatory Commission (FERC) notice of proposed rulemaking (App. 34a-60a) is reported at 49 Fed.Reg. 36399. FERC's Order No. 406 accompanying issuance of its final rule (App. 61a-103a) is reported at 49 Fed.Reg. 46874 and F.E.R.C. Stats. and Regs. ¶ 30,613 and 29 FERC ¶ 61,202 (CCH) (1984). FERC's opinion (Order No. 406-A) denying rehearing in relevant part (App. 104a-126a) is reported at 49 Fed. Reg. 50637 and F.E.R.C. Stats. and Regs. ¶ 30,622 and 29 FERC ¶ 61,335 (CCH) (1984).

## JURISDICTION

The judgment of the court of appeals (App. 32a-33a) was entered on March 9, 1987. The order of the court of appeals, denying timely filed petitions for rehearing was entered on May 1, 1987 (App. 29a-31a). On July 22, 1987, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including August 31, 1987. The petition was filed on that date and was granted on November 30, 1987. On November 30, the Court ordered that this case be consolidated with No. 87-363, *Federal Energy Regulatory Commission v. Martin Exploration Management Company, et al.* The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES AND REGULATION INVOLVED

Section 101(b)(5) of the Natural Gas Policy Act of 1978, 15 U.S.C. 3311(b)(5), provides:

3311. Inflation adjustment: other general price ceiling rules

\* \* \*

(b) Rules of General Application.

\* \* \*

(5) Sales qualifying under more than one provision. If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Section 121 of the Natural Gas Policy Act of 1978, 15 U.S.C. 3331, provides in pertinent part:

3311. Elimination of price controls for certain natural gas sales.

(a) General rule. Subject to the reimposition of price controls as provided in section 3332 of this title, the provisions of part A of this

subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e) of this section, cease to apply effective January 1, 1985:

\* \* \*

18 C.F.R. 270.208 (1986) provides:

### Applicability of Section 121

First sales of natural gas that is deregulated natural gas as defined in [18 C.F.R.] § 272.103(a) is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

## STATEMENT

In 1978, Congress enacted the Natural Gas Policy Act ("NGPA" or "the Act"), 15 U.S.C. 3301 *et seq.*, "to govern future natural gas regulation" because the then existing "regulatory structure was not working." *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board* 474 U.S. 409, 420 (1986) quoting *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 330, 332 (1983). "Congress comprehensively and dramatically changed the method of pricing natural gas produced in the United States." *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. at 322. Phased deregulation of most categories of new natural gas is central to this statutory scheme and the transition to a deregulated gas production industry. See, H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. 68 (1978); *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. at 336, n.14. The question here is whether FERC permissibly determined that all maximum lawful ceiling pricing provisions of the NGPA cease to apply to first sales of natural gas when such gas is deregulated under Section 121 of the NGPA, even if such gas also would qualify for a ceiling price which remains in effect for regulated

gas. Under FERC's decision, producers cannot rely upon the NGPA to charge regulated ceiling prices for certain categories of gas after those categories have been deregulated. The court of appeals rejected FERC's construction of the NGPA.

1. Most of the contracts for the sale of natural gas entered into since the early 1970's, when Congressional legislation to deregulate such sales became likely (*Public Service Commission of the State of New York v. Mid-Louisiana Gas Company*, 463 U.S. at 330), have contained separate provisions governing the prices to be paid under regulation and the prices to be paid if and when the sales were deregulated. Typically, the contractual pricing provisions applicable under regulation authorized the producer to charge the maximum lawful price which might thereafter be established. Under such "area rate" provisions, the producers have been held to be contractually entitled to collect either the maximum price fixed by FERC for the gas under the Natural Gas Act, 15 U.S.C. 717 *et seq.* ("NGA"), or any wellhead ceiling price established by Congress. *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981) *cert. denied*, 454 U.S. 1142 (1982). The separate contract pricing provisions applicable to the sales under deregulation, on the other hand, generally provided for a stated benchmark price to be applicable as of the date of deregulation subject to periodic renegotiations to arrive at prices reflecting current market conditions.

2. Prior to November 1978, the prices for gas sold by producers in interstate commerce for resale were determined by the Federal Power Commission and its successor, FERC, pursuant to provisions of the NGA. See *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. at 327-332. This regulatory scheme was drastically altered when Congress enacted the NGPA on November 8, 1978. Under the NGPA, Congress eliminated FERC's authority to fix the just and reasonable rates for first sales of various categories of natural gas and, in its stead, prescribed a series of ceiling prices which were to be maximum lawful prices. *Id.* at 334.

Because some first sales of gas would qualify for more than one regulated pricing category, the NGPA provided in Section 101(b)(5), 15 U.S.C. 3311(b)(5), that where gas

qualified under more than one ceiling price "or for any exemption from such a price," the provision which "could" result in the highest price shall be applicable. See *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. at 335. The NGPA also provides that a producer cannot exceed its contract price for any category of gas even if that price is less than the ceiling price applicable to that category. Section 101(b)(9), 15 U.S.C. 3311(b)(9).

In addition to the ceiling price mechanism, the NGPA also provides in Section 121, 15 U.S.C. 3331, for price deregulation of certain categories of gas on specified dates. Under Section 121, with certain exceptions inapplicable here, "the provisions . . . respecting the maximum lawful price for the first sale" of listed categories of gas "shall . . . cease to apply effective January 1, 1985." For these sales of gas, the statutory "ceiling prices are an intermediate step on the path from a fully regulated industry to a deregulated industry." *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. at 336, n.14. Section 121 thus provides "a mechanism for the ultimate decontrol of a number of categories of natural gas." *Id.*

The NGPA represented a legislative compromise between those who wished to deregulate all gas sales, or all sales of new gas, and those who desired to retain price regulation over all gas, or at least over already flowing gas. See *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. at 331-333. Specifically, Congress in the NGPA provided that old flowing gas (and certain new gas produced from older reservoirs on old leases in the Outer Continental Shelf), would remain permanently subject to regulation, while categories of new and high cost gas would be subject to substantially higher ceiling rates for specified periods expiring in 1979, 1985, or 1987, at which time they would be deregulated pursuant to the provisions of Section 121 of the NGPA. In addition, Congress established a third category of higher price ceilings, applicable to either old or new gas, which was produced in small quantities from so-called "stripper wells" (Section 108, 15 U.S.C. 3318) or involved high cost production

which FERC found to present extraordinary risks or costs (Section 107(c)(5), 15 U.S.C. 3317(c)(5)).

3. In 1984, the FERC initiated a rulemaking proceeding to implement the congressionally required deregulation of major categories of new gas scheduled to become effective on January 1, 1985. See 49 Fed. Reg. 36,399 (1984). Following the filing of extensive comments, FERC concluded that all of the pricing provisions of Title I of the Act ceased to be applicable to the categories of gas deregulated pursuant to Section 121, even though such gas might also qualify for another category not subject to price deregulation under Section 121. In its order denying rehearing, 30 FERC ¶ 61,152 (CCH) (1985), FERC explained that:

The statute clearly states that price controls for certain "gas" shall cease to apply January 1, 1985. NGPA Section 121 mandates deregulation for these categories of gas. The fact that some of this gas also qualifies for another gas category does not alter this congressional mandate to deregulate.

The producers contended (App. 79a) that Section 101(b)(5) permits them to charge regulated ceiling rates under the "area rate" provisions of their sales contracts for "stripper well gas" under Section 108 of the NGPA or high cost gas under Section 107(c)(5), in lieu of charging prices prescribed under the post-deregulation pricing provisions of their sales contracts. However, FERC, finding that deregulation is mandatory under Section 121, rejected the producers' argument that Section 101(b)(5) is applicable to the gas at issue here. (App. 79a-80a).<sup>1</sup> In addition, FERC concluded that, even if the reference in Section 101(b)(5) to an exemption from a regulated price made the section to gas qualifying both for deregulation and a regulated ceiling, applicable the provision would

<sup>1</sup> FERC noted (App. 74a) that the producers themselves had previously argued that this provision was inapplicable, but had changed their position as market conditions changed to make regulated price ceilings more attractive than the provisions of their contracts governing the price for the sale subsequent to deregulation.

not allow producers to choose the highest price existing at any given time, whether regulated or deregulated; instead, FERC concluded that producers would still be required to apply the contract's provisions governing post-deregulation prices because parties may always negotiate a contract price that would be above a regulated price and, therefore, the deregulated price always "could result in a price higher than a regulated price." *Id.* at 79a.

4. Respondents petitioned to the United States Court of Appeals for the Tenth Circuit for review of FERC's order. A panel of the court of appeals set aside FERC's order on the dual qualification gas issue ruling that "FERC's interpretation is contrary to the clear intent of Congress as expressed in the unambiguous language of Section 101(b)(5) of the NGPA" (App. 22a).

The court of appeals held (App. 11a) that "Congress anticipated precisely this question in Section 101(b)(5)." The court first reasoned that Section 101(b)(5) is applicable to deregulated gas because it refers to gas qualifying under the provisions or the subchapter providing for any maximum lawful price or "for any exemption from such a price" and deregulated gas constitutes an "exemption from such a price" (App. 14a). As to FERC's conclusion that deregulated gas always "could result in the highest price" by contractual agreement, the court said that the regulated price for the gas "could" be higher at a given time because FERC is empowered to raise the ceiling prices for flowing gas to "just and reasonable" levels (App. 15a) and Section 101(b)(5) "requires a comparison of the applicable price for each category at a particular moment" (*id.* at 16a). The court of appeals recognized that the result of its decision rejecting FERC's interpretation of the NGPA is that considerable quantities of gas will be sold at higher regulated prices when contract prices for deregulated gas geared to market conditions are at a lower level, a result Congress did not envision. But it concluded that the result was due to Congress' lack of foresight and was a matter for legislative overview (App. 23a-24a).

## SUMMARY OF ARGUMENT

In enacting the NGPA, Congress determined to phase in deregulation of natural gas wellhead prices and thus provided in plain, unambiguous language that the Act's statutory ceiling prices "shall . . . cease to apply" to various categories of gas at the various dates set for deregulation. Congress provided no exception for gas that also may qualify for a regulated ceiling price. To implement the congressional mandate, FERC enacted the regulation challenged here, 18 C.F.R. 270.208 (1986), which states that deregulated natural gas is "not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under subtitle A of Title I of the NGPA."

FERC's interpretation of the statute should be upheld because it is reasonable, if not compelling, and fully supported by the language of the statute, the legislative history and the congressional purpose. Even the lower court found FERC's interpretation "would be a reasonable interpretation" were it not for Section 101(b)(5) which provides that if natural gas qualifies for more than one "maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable."

But, assuming Section 101(b)(5) is applicable when gas qualifies for deregulation under one of the Section 121 categories and for a ceiling price under another category, the deregulated price must govern because it always "could result in the highest price." This follows from the fact that the statutory ceiling prices are upper limits while there are no statutory limitations on deregulated prices. Moreover, the lower court's interpretation leads to the absurd result of allowing producers to switch monthly between regulated and deregulated prices to select those they find most beneficial.

FERC's construction is entitled to deference even in the ordinary case, but the general principle is particularly compelling here regardless of whether another reading of the statutory language might also be appropriate. At a minimum, it

is enough that FERC's interpretation is permissible. FERC's interpretation is the only one which is consistent with the statutory scheme and is a permissible one adopted by the regulators who first set the NGPA's machinery in motion.

## ARGUMENT

### SECTION 121 OF THE NATURAL GAS POLICY ACT OF 1978 COMPELS DEREGULATION FOR ALL QUALIFYING GAS, INCLUDING THAT WHICH ALSO QUALIFIES FOR REGULATED PRICING CEILINGS

#### A. The Plain Language of the NGPA And Its Legislative History Demonstrate That Reg- ulated Prices Were Not Intended To Apply Once Gas Qualifies For Deregulation

The language of Section 121 of the NGPA, "Elimination of price controls for certain natural gas sales," provides as the "General rule" that "the provisions of part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall . . . cease to apply" at the various dates set for deregulation. The statute in straightforward terms provides that the statutory ceiling prices shall no longer apply to the specified gas on the listed dates. Congress left no room for discretion. In plain, unambiguous terms, Congress removed the ceiling prices for such gas in favor of deregulation and reliance upon the sales contract. The mandatory statutory language includes no exceptions (except for the possibility of Presidential reimposition of price controls under Section 122 of the NGPA which is not applicable here). Nor does the language limit in any way removal of the ceiling prices for the listed categories of gas when, but for deregulation, that gas would qualify for statutory ceiling prices. Instead, under the congressional scheme, all provisions of the Act providing ceiling prices for the categories of gas which are deregulated "cease to apply" on the given dates.

FERC thus enacted its regulation under review here, 18 C.F.R. 270.208 (1986), which provides that deregulated natural

gas "is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA." FERC concluded that the language of Section 121, that price controls "shall . . . cease to apply January 1, 1985," mandates deregulation for the listed categories of gas (App. 75a-77a, 108a-110a). In FERC's view, "[t]he fact that some of this gas also qualifies for another gas category does not alter this Congressional mandate to deregulate" (App. 109a). FERC found its construction of the NGPA to be compelled not only by the language of Section 121, but also by the congressional intent "to phase from regulated ceiling prices in the short-term to market clearing prices in the long-term" (App. 76a).

That should have been the end of the matter. The language of Section 121 is plain and unambiguous and therefore should be conclusive. *E.g.*, *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981). FERC's construction of the statute is compelling; at a minimum, it is reasonable and permissible, and it is entitled to deference. *E.g.*, *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *Chemical Mfrs. Assn. v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985). Giving lip service to those maxims, the lower court found (App. 11a) FERC's interpretation of the language of Section 121 "would be a reasonable interpretation." It nevertheless concluded that this language was "ambiguous" and that FERC's otherwise reasonable interpretation could not be sustained in the light of the "plain language" of Section 101(b)(5) which, the court concluded, controlled the present situation and required a contrary result (App. 11a). The lower court is simply wrong.

In the first place, Section 121 is not ambiguous. The alleged ambiguity stems from the fact that Section 121 provides for deregulation of specified categories of gas rather than repeal of specific pricing categories. It was therefore argued by various producer parties that the pricing provisions which "cease to apply" to deregulated gas are limited to those necessarily applicable to the listed types of gas being deregulated

and that the other pricing provisions for which such gas might qualify remain in effect. (App. 11a).

The court of appeals did not hold that such an interpretation would be justifiable. It could not have done so since Section 121 contains no such limitation. Thus it does not state that the ceiling price specified by Section 102 shall cease to apply to gas qualifying under Section 102(c), (one of the categories of gas deregulated as of January 1, 1985). Instead, it specifies that as of that date all "provisions of part A of this subpart respecting the maximum lawful price for the first sale" of gas as defined in Section 102(c) "shall . . . cease to apply".

Moreover, there is no indication that Congress intended Section 101(b)(5) to control the situation presented here. The language of Section 101(b)(5) says nothing about deregulated gas and we are unaware of even a single statement in the legislative history that suggests that Congress intended Section 101(b)(5) to apply when categories of gas qualify for deregulation.

The lower court construed Section 101(b)(5) as providing that if a sale of gas which had been qualified under two pricing provisions of the NGPA and is "exempted" from complying with one of the price ceilings pursuant to Section 121, but the sale remains qualified for treatment under another price category, the producer has the option, exercisable on a month-by-month basis, to choose whether to price the gas under either the regulated price provisions or the post-deregulation price provisions of its sales contracts. However, Section 121 does not make specific pricing provisions inapplicable to deregulated gas. Instead, under Section 121, none of the Act's pricing provisions any longer apply to deregulated gas. If prior to its deregulation, gas is eligible for both the Section 102 and 108 ceiling prices, after deregulation it is eligible for neither: both cease to apply, and it is exempted from complying with the limitations of both.

Any interpretation of Section 101(b)(5) which allows producers a permanent option to operate under regulation or deregulation, as it suits their immediate interests, is inconsistent with the legislative history of the Section. As Representative

Dingell, House floor leader<sup>1</sup> for the bill which became the NGPA, emphasized in his comprehensive explanatory statement of the bill's intent, Section 101(b)(5):

is intended to facilitate resolution of which ceiling may apply if more than one ceiling price appears applicable. Whichever ceiling price could result in the highest price is the applicable maximum lawful price. 124 Cong. Rec. 38363 (1978).

Representative Dingell further explained that the producer's option between two maximum pricing provisions was only available prior to deregulation of the gas involved in the sale:

Another way in which dual determination requests could be appropriate would be in cases in which one determination would yield a short term benefit, while another a long term advantage. Such could be the case where a new well produces new gas and also qualifies as a stripper well. A single proceeding to determine qualification for both designations *would permit the producer to obtain stripper well pricing under Section 108 prior to January 1, 1985 and deregulation as new gas thereafter.*

(*Id.*) (Emphasis added).<sup>2</sup>

In addition, as FERC said (App. pp. 77a-78a), Section 121 of the Act expressly makes all of the provisions of Subtitle A of Title I of the Act, including the rule of construction set out in Section 101(b)(5), inapplicable to deregulated gas.

<sup>2</sup>The contrary result reached by the court below would allow the producer to continue to collect the ever increasing ceiling price under Section 108, which is presently at a level of \$5.103 per Dth and increases at 4% per month, plus an inflation factor. It is inconceivable Congress intended that this ever-increasing rate would be applicable to deregulated gas in perpetuity. Instead Congress clearly adopted the very high ceiling price for stripper well gas in recognition of the fact that that section would be applicable to "new" gas only until it was deregulated, (after which market forces would prevail), and to old flowing gas (or gas produced from old reserves on old offshore leases) only until the finite reserves of such gas were depleted.

The lower court suggested (App. 13a) that this argument goes too far since it would make inapplicable to deregulated gas all the rules of construction and other provisions contained in Section 101 of the Act. But these provisions are related to the computation of the maximum lawful prices set out in Subtitle A of Title I and are not necessary for the proper construction either of Subtitle B thereof, or the remainder of the Act. The definitions of general applicability are, instead, set out separately in Section 2, 15 U.S.C. 3301, which precedes any of the substantive provisions of the Act.

Finally, even if the reference to gas qualifying for an exemption from any ceiling price in Section 101(b)(5) refers to gas which has been deregulated under Section 121, it does not support the lower court's decision. Contrary to the court of appeals' conclusion, any ambiguity in the provisions at issue arises from Section 101(b)(5) and not Section 121. The ambiguity, if any, is in the word "could" in the clause of Section 101(b)(5): "the provision which could result in the highest price shall be applicable". No ambiguity occurs when Section 101(b)(5) is applied to gas that qualifies for one or more regulated price categories; it conceivably occurs only when gas qualifies for one of the categories deregulated under Section 121 and one of the categories subject to a regulated ceiling price. The most reasonable interpretation of Section 101(b)(5) in such circumstances, and the only one which is consistent with Section 121, would be as FERC found, that where gas qualifies both for deregulation under Section 121 and for a regulated price, the deregulated price will govern because it always "could result in the highest price." Whether at a particular moment a regulated ceiling price might be higher than an unregulated price is irrelevant. Because there are no *statutory* limitations on a deregulated price, it always "could" be higher than any regulated price.

Under these circumstances, the lower court erred in finding Congress clearly expressed its intent in the language of Section 101(b)(5) and in refusing to defer to FERC's permissible construction. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, supra*; *NLRB v. United Food & Commercial Workers Union, Local 23*, 56 U.S.L.W. 4037, 4040-41 (U.S. Dec. 15, 1987).

**B. The Purposes of the NGPA And FERC's Contemporaneous Interpretation Confirm That Regulated Prices Are Inapplicable To Dually Qualified Gas**

The foregoing amply demonstrates that FERC's construction of the NGPA is reasonable. The NGPA's general purposes support FERC's conclusion that statutory ceiling prices for first sales of such gas no longer apply as soon as that gas qualifies for deregulation. What is significant in understanding Congress' intent in enacting the NGPA is the harm the statute was designed to prevent and the situation "as it was pressed upon the attention of the legislative body." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892). See *United Steelworkers of America v. Weber*, 443 U.S. 193, 207 (1979); *United States v. Wise*, 370 U.S. 405, 411 (1962). The circumstances surrounding enactment of the NGPA show that FERC's interpretation of the statute, and not that of the lower court, "can most fairly be said to be imbedded in the statute in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984).

The history of the NGPA indicates that the principal concern underlying adoption of the NGPA was serious gas shortages and an imbalance between supply and demand existing under the pricing scheme of prior legislation. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 420 (1986). Congress found that "direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments." *Id.* at 424. To remedy this situation, and "to assure adequate supplies of natural gas at fair prices," Congress enacted an overall scheme of phased deregulation. *Id.* at 421. See also 124 Cong. Rec. 38361 (1978) (remarks of Rep. Dingell); 124 Cong. Rec. 29659 (1978) (remarks of Sen. Percy).

FERC therefore correctly determined that its interpretation of the NGPA as compelling deregulation for qualifying gas was fully "consistent with the overall scheme envisioned

by Congress when it enacted the NGPA—to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987" (App. 74a). FERC implemented the NGPA in a way which gives meaning to the congressional intent to deregulate.

In sharp contrast, the lower court's interpretation of the statute vitiates this purpose.<sup>3</sup> Because pricing of natural gas under the lower court's decision turns on monthly analyses of which conditions are most favorable to producers, the congressional objective of staged deregulation is substantially damaged. The lower court's decision improperly benefits the producers by giving them a monthly choice between deregulated and regulated prices to secure the highest price at any given time. This result is contrary to the congressional effort to allow market forces to determine prices and "to eliminate the distortive efforts that NGA price control had had on supply and demand." *Transcontinental Gas Pipe Line v. State Oil and Gas Board*, 474 U.S. at 424.

Moreover, the lower court's interpretation of the NGPA cannot stand for the additional reason that it would produce absurd results which must be avoided when, as here, an alternative interpretation consistent with the legislative purpose and statutory language is available. See *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542-543 (1940); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). It is absurd to construe the NGPA to allow producers to freely move, at their option, from regulation to deregulation and back again. To allow producers to maximize profits in this way would turn the statute on its head because it would change "consumer protection" legislation (See Note, *Legislative History of the Natural Gas Policy Act*: Title I, 59 Tex. L. Rev. 101, 116 (1980)) into a windfall for producers at an additional

<sup>3</sup>It is noteworthy that respondents have not explained how they believe the lower court's interpretation is consistent with the legislative intent to phase-in deregulation. Nor have respondents shown that Congress intended to allow producers to choose between regulated and deregulated prices or to switch gas back and forth.

expense to consumers which has been estimated to exceed three hundred million dollars for the years 1985-1987 alone.

This Court should not reject FERC's interpretation of Sections 101(b)(5) and 121, which has been formalized in a regulation after extensive comments and analysis. FERC has consistently construed Section 121 to mean that all specified categories of gas are deregulated, regardless of whether such gas might also qualify for a higher ceiling price remaining applicable to regulated gas. An agency's interpretation of the statute it is charged with executing should not be overturned unless there are "compelling indications" that the interpretation is wrong. See, e.g., *Miller v. Youakim*, 440 U.S. 125, 143-144 & n.25 (1979); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51 (1978). It is enough that FERC's interpretation "is based on a permissible construction of the statute," even if there are other allowable interpretations, for "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the . . . agency" charged with implementing the statute. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-844 (1984); see *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986). These maxims are particularly apt where, as here, the agency's interpretation is a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co. v. United States*, *supra*, 288 U.S. 294, 315 (1933).<sup>4</sup>

In sum, every indicium of legislative intent — the "overall structure of the Act, Congress' statements of purpose and policy, the legislative history, and the text of" the NGPA (*Board of Education v. Harris*, 444 U.S. 130, 149-150 (1979))

<sup>4</sup>There is no merit to respondents' claim (Br. in Opp. 9, n.7) that FERC's construction of the statute is too late to be considered contemporaneous. See, e.g., *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961) where an administrative construction approximately five years after enactment of the Atomic Energy Act was contemporaneous and entitled to deference.

— supports FERC's conclusion that regulated prices no longer apply to gas that also falls within the deregulation mandate of Section 121 of the NGPA.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

RAYMOND B. SHIBLEY  
BRIAN D. O'NEILL  
LeBoeuf, Lamb, Leiby &  
McRae  
1333 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

*Counsel for Panhandle  
Eastern Pipeline Company*

FREDERICK MORING  
HERBERT J. MARTIN  
Crowell & Moring  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2505

*Counsel for Associated  
Gas Distributors*

RICHARD A. SOLOMON  
MARK N. MUTTERPERL  
Wilner & Scheiner  
Suite 300  
1200 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

*Counsel for The Public Service  
Commission of the State of  
New York*

TERENCE J. COLLINS  
ROBERT BALLENTINE  
P.O. Box 2511  
Houston, Texas 77252-2511

*Counsel for Tennessee Gas  
Pipeline Company*

January 14, 1988

## **ADDENDUM**

(Listings naming all parent companies, subsidiaries, and affiliates of the corporate petitioners)

# TENNECO INC. AND SUBSIDIARIES AND AFFILIATES

TENNECO INC. (Delaware)	
Agricultural & Industrial Management, Inc. (Delaware) . .	100%
Albright & Wilson Inc. (Delaware) . . . . .	100
Chemrich, Inc. . . . .	100
Brake-Pro Systems Inc. (Delaware) . . . . .	100
DeKoven Manufacturing Co. (Wisconsin) . . . . .	100
East Tennessee Natural Gas Company (Tennessee) . . . . .	100
Eastern Insurance Company Limited (Bermuda) . . . . .	100
ERCO Industries Inc. (Delaware) . . . . .	100
Houston Oil & Minerals Corporation (Nevada) . . . . .	100
Houston Oil & Minerals Exploration Company (Texas) . . . . .	100
Houston Oil & Minerals Products Company (Texas) . .	100
Houston Oil International, Inc. (Texas) . . . . .	100
HOCOL, S.A. (Cayman Islands) . . . . .	100
J.I. Case GmbH (Germany) . . . . .	100
J.I. Case S.A. (France) . . . . .	100
Etablissement Lacroix S.A. (France) . . . . .	100
Etablissement L. Bouilloux S.A. (France) . . . . .	98
Poclain S.A. (France) . . . . .	44
Agencias Petroleras, Ltda. (Colombia) . . . . .	100
Tenneco Espana SA (Spain) . . . . .	100
Tenneco Petrole Gabon, S.A. (Cayman Islands) . . . . .	100
Houston Oil & Minerals of Columbia, Inc. (Texas) . . . . .	100
Houston Oil & Minerals of Dubai, Inc. (Texas) . . . . .	100
Houston Oil & Minerals of The Netherlands, Inc. (Texas) . . . . .	100
Houston Oil & Minerals of Tunisia, Inc. (Texas) . . . . .	100
Houston Oil & Minerals U.K., Inc. (Texas) . . . . .	100
LaTerre Colombia, S.A. (Cayman Islands) . . . . .	100
Tenneco Oil & Minerals of UMM AL-QAIWAIN (Texas) . . . . .	100
Tenneco Oil of Gabon, Inc. (Texas) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

Houston Production Company (Texas) .....	100%
Houston Royalty Company (Nevada) .....	100
Magrange Inc. (Texas) .....	100
Intake Water Company (Delaware) .....	100
Kern River Corporation (Delaware) .....	100
Kern River Gas Transmission Company (Texas General Partnership) (Kern River Corporation has 50% ownership as General Partner and Williams Western Pipeline Company, an unaffiliated company, has 50% ownership as General Partner)	
Kern River Gas Supply Corporation (Delaware) .....	50
(50% ownership by The Williams Companies, an outside company)	
Kern River Service Corporation (Delaware) .....	50
(50% ownership by The Williams Companies, an outside company)	
Land Ventures Inc. (Delaware) .....	100
Lorneterm LNG Limited (Canada) .....	100
Midwestern Gas Transmission Company (Delaware) .....	100
Midwestern Gas Marketing Company (Delaware) .....	100
Mineral Tenneco de Panama, S.A. ....	100
Monroe Auto Equipment Company (Delaware) .....	100
E-Z Ride Shock Absorber Company (Michigan) ....	100
Monroe Argentina S.A.I.C. y F. (Argentina) .....	100
Monroe Auto Equipement France S.A. (France) ....	100
Monroe Auto Equipment GmbH (Germany) .....	100
Monroe do Brasil Industria e Comercio Ltda. (Brazil) .....	100
Monroe Auto Pecas S.A. (Brazil) .....	80
Monroe Japan Co., Ltd. (Japan) .....	100
Regal Ride Shock Absorber Company (Michigan) .....	100
Sudinpar Holding Etablissement (Liechtenstein) .....	100
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica) .....	98
Tenneco Automotive International Sales Corporation (Delaware) .....	100
New Tenn Company (Delaware) .....	100

*Subsidiaries of Tenneco Inc. (continued)*

Northeastern Gas Transmission Company (Delaware) ...	100%
Tenneco Alaska, Inc. (Delaware) .....	100
Tenneco China Trade Inc. (Delaware) .....	100
Tenneco United Company (a Texas General Partnership) (Tenneco China Trade, Inc. has 50% ownership and Indamerica International, Inc., a California corporation has 50% ownership.)	
Tenneco Coal Company (Delaware) .....	100
Tenneco Communications Corporation (Delaware) .....	100
Tenneco Corporation (Delaware) .....	100
Bloor Automotive Inc. (Delaware) .....	100
Discoverer Services, Inc. (Delaware) .....	100
Blue Flame Gas Corporation (Delaware) .....	100
Car-X Service Systems, Inc. (Delaware) .....	100
Channel Industries Gas Company (Delaware) .....	100
Channel Industrial Sales Company (Delaware) .....	100
Collins Pipeline Company (Delaware) .....	80
Columbine Casualty Company (Colorado) .....	100
G & T Pipeline Company (Delaware) .....	100
International Sourcing and Countertrade Company (Delaware) .....	100
Kern County Land Company (Delaware) .....	100
Boquillas Cattle Company (Arizona) .....	100
J. I. Case Company (Delaware) .....	100
Case Engine Holding Company, Inc. (Delaware) .....	100
Consolidated Diesel Company (North Carolina Partnership) .....	50
Consolidated Diesel, Inc. (Delaware) .....	100
Grand Detour Plow Company (Wisconsin) .....	100
Kase S.A. De D. V. (Mexico) .....	100
J. I. Case Argentina S.A. (Argentina) .....	100
J. I. Case Credit Corporation (Wisconsin) .....	100
J. I. Case International, S.A. (Venezuela) .....	100
J. I. Case Leasing Corporation (Wisconsin) .....	100
J. I. Case Mfg. Company, Inc. (Wyoming) .....	100
J. I. Case Threshing Machine Company (Wisconsin) .....	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Kern County Land Company  
(continued)*

*Subsidiaries of J. I. Case Company  
(continued)*

Pryor Foundry, Inc. (Oklahoma) . . . . .	100%
Steiger Tractor, Inc. (Delaware) . . . . .	100
Integrated Technical Systems, Inc. (North Dakota) . . . . .	100
Steiger Australia Ltd. (North Dakota) . . . . .	100
Steiger Financial Corp. (Pty) Ltd. (Australia) . . . . .	100
Steiger Canada Ltd. (Canada) . . . . .	100
Steiger Credit Company (North Dakota) . . . . .	100
Steiger Credit Canada Ltd. (Canada) . . . . .	100
Steiger International, Ltd. (Guam) . . . . .	100
Tenneco Canada Inc. (Ontario) . . . . .	100
Dunville Mining Co. Limited (Alberta) . . . . .	100
Electric Reduction Sales Co., Ltd. (Canada) . . . . .	100
ERCO Industries of Canada Limited (Canada) . . . . .	100
J. I. Case do Brasil & Cia. (Brazil) . . . . .	100
Case Capital Assets Manage- ment S/C Ltda. (Brazil) . . . . .	100
Productors Andina de Acidos y Derivados Ltda (Columbia) . . . . .	49
Tenneco Credit Canada Corpora- tion (Alberta) . . . . .	100
The Case Company (Wisconsin) . . . . .	100
Pueblo Del Sol Water Company (Arizona) . . . . .	100
Tenneco West, Inc. (Delaware) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Kern County Land Company  
(continued)*

*Subsidiaries of J. I. Case Company (continued)*

Ag-Ventures, Incorporated (California) . . . . .	100%
Cal-Date Company (California) . . . . .	100
California Almond Orchards, Inc. (California) . . . . .	100
California Harvest Shops, Incorporated (California) . . . . .	100
Grandma Mac's Orchard, Inc. (California) . . . . .	100
H-M-T Inc. (California) . . . . .	100
Heggblade-Marguleas-Tenneco, Inc. (California) . . . . .	100
House of Almonds, Inc. (Delaware) . . . . .	100
Kern County Land Company, Inc. (California) . . . . .	100
Kern Island Water Company (California) . . . . .	100
Kern River Canal and Irrigating Company (California) . . . . .	98
Sun Giant Sales Corporation (California) . . . . .	100
Tenneco Exploration, Ltd. (Texas Limited Partnership) Tenneco Oil Company has 66.66% ownership as General Partner and Tenneco West, Inc. has 33.33% ownership as Limited Partner)	
Tenneco Exploration, Ltd. II (Texas Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco West, Inc. has 50% owner- ship as Limited Partner)	
Tenneco Farming Company (California) . . . . .	100
Tenneco Property Development Corporation (California) . . . . .	100
LHC Pipeline Company (Delaware) . . . . .	100
Marlin Drilling Co., Inc. (Delaware) . . . . .	100
Bluefin Supply Company (Delaware) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

Marlin International Drilling Company (Delaware) .....	100%
Marlin Colombia Drilling Co. Inc. (Delaware) .	100
Marlin-West Drilling Co., Inc. (Delaware) .....	100
Mitchell Supreme Fuel Company (Delaware) .....	100
Petro-Tex Chemical Corporation (Delaware) .....	100
Philadelphia Life Corporation (Pennsylvania) .....	100
State Gas Pipeline Company (Delaware) .....	100
SWL Development Corp. (Texas) .....	100
Counce Limited Partnership (Texas Limited Partnership) (SWL Development Corp. has 5% ownership as General Partner and Tenneco Credit Corporation has 95% ownership as Limited Partner)	
Counce Finance Corporation (Delaware) .	100
SWL Security Corp. (Texas) .....	100
T & M Terminal Company (Delaware) .....	80
Tenneco Aviation Limited (Delaware) .....	100
Tenneco Credit Corporation (Delaware) .....	100
Counce Limited Partnership (Texas Limited Partnership) (Tenneco Credit Corporation has 95% ownership as Limited Partner and SWL Development Corp. has 5% ownership as General Partner)	
Counce Finance Corporation (Delaware) .	100
Tenneco Storage Limited Partnership (Louisiana Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco Credit Corporation has 50% ownership as Limited Partner)	
Tenneco Storage Capital Corporation (Delaware) .....	100
Tenneco Cogeneration Development Company (Delaware) .....	100
Tenneco Financial Services Inc. (Delaware) .....	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

Tenneco Asset Management Company (Delaware) .....	100
Tenneco Asset Planning Company (Delaware)	100
Tenneco Inc. (Nevada) .....	100
Tenneco Insurance Company (Delaware) .....	100
Argosy Offshore Ltd. (Texas Limited Partnership) (FC Marine Inc. has 1% ownership as General Partner; Tenneco Insurance Company has 74% ownership as Limited Partner; and Skips A/S Tudor (Norway) has 25% ownership as Limited Partner)	
Tenneco Insurance Ventures Inc. (Delaware) ....	100
Tenneco InterAmerican Inc. (Delaware) .....	100
LIG Chemical Company (Louisiana) .....	100
Louisiana Intrastate Gas Corporation (Louisiana) .....	100
Mid Louisiana Gas Company (Delaware) ....	100
Sunbelt Gas Gathering Company (Delaware) .....	100
Newport News Shipbuilding and Dry Dock Company (Virginia) .....	100
Asheville Industries Inc. (North Carolina) ...	100
Greeneville Metal Manufacturing, Inc. (Virginia) .....	100
The James River Oyster Corporation (Virginia) .....	100
Newport News Industrial Corporation (Virginia) .....	100
Newport News Industrial Corporation of Ohio (Ohio) .....	100
Newport News Offshore Systems Corporation (Virginia) .....	100
Newport News Reactor Services, Inc. (Virginia) .....	100
SBG Puerto Rico, Inc. (Puerto Rico) .....	50
Packaging Corporation of America (Delaware) ...	100

*Subsidiaries of Tenneco (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

— Economy Printing & Lithographing Co.	
(Texas) . . . . .	100
Alcan Ekco Limited (United Kingdom) . . . . .	50
A/S Hastrup-Ekco Aluminum-Emballage	
(Denmark) . . . . .	50
Plus Pack AB Svenska Hastrup-Ekco	
(Sweden) . . . . .	100
Plus Pack A/S (Norway) . . . . .	100
Plus Pack GmbH (Austria) . . . . .	100
Plus Pack GmbH (Switzerland) . . . . .	100
Ekco N. V. (Belgium) . . . . .	100
Ekco GmbH (Germany) . . . . .	100
Ekco S.A.R.L. (France) . . . . .	100
Lake States Carriers, Inc. (Illinois) . . . . .	100
Toyo Ekco Company, Ltd. (Toyo Ekco	
Kubushiki, Kaisha) (Japan) . . . . .	50
Skogstre A/S (Norway) . . . . .	50
Tennessee River Pulp & Paper Company	
(Delaware) . . . . .	100
The Corinth and Counce Railroad Company	
(Mississippi) . . . . .	100
Tuscaloosa Pipeline Company (Louisiana) . . . . .	100
Tenneco Minerals Company (Delaware) . . . . .	100
Prometheus Minerals (Canada) Ltd. (Canada) . . . . .	100
Tenneco Minerals Company of Australia,	
Inc. (Delaware) . . . . .	100
Tenneco Specialty Minerals Company (Delaware) . . . . .	100
Windy Point Minerals, Ltd. (Canada) . . . . .	100
Tenneco Oil Company (Delaware) . . . . .	100
Calldyne, Inc. (Delaware) . . . . .	100
Direct Oil Corporation of Texas (Texas) . . . . .	100
FC Marine Inc. (Delaware) . . . . .	75
(Skips A/S Tudor owns 25%)	

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Tenneco InterAmerica, Inc. (continued)*

Argosy Offshore Ltd. (Texas Limited	
Partnership)	
(FC Marine Inc. has 1% ownership as	
General Partner; Tenneco Insurance	
Company has 74% ownership as	
Limited Partner; and Skips A/S Tudor	
(Norway) has 25% ownership as Limit-	
ed Partner)	
GEO Oil and Gas Company of Houston	
(Delaware) . . . . .	100%
Greene's Propane Gas Corporation (Georgia) . . . . .	100
HCT Oil and Gas Company (Delaware) . . . . .	100
LaTerre Development Corp. (Delaware) . . . . .	100
LaTerre Petroleum (U.K.), Inc. (Delaware) . . . . .	100
LEDSCO, Ltd. (Pennsylvania Limited	
Partnership)	
(Tenneco Oil Company has 99% owner-	
ship as Limited Partner and One Inde-	
pendence Corporation has 1% owner-	
ship as General Partner)	
Resource Oil and Gas Company	
(Delaware) . . . . .	100
TINCO, Ltd. (Texas Limited Partner-	
ship)	
(LEDSCO, Ltd. has 43.3% owner-	
ship as Limited Partner and Tenneco	
Oil Company has 56.7% ownership	
as General Partner)	
Mistal, Inc. (Delaware) . . . . .	51
Mont Belvieu Land Company (Delaware) . . . . .	100
Multistate Oil Properties, Inc. (Delaware) . . . . .	100
Multistate Oil Properties, N.V. (Netherlands	
Antilles) . . . . .	100
One Independence Corporation	
(Delaware) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Tenneco Oil Company (continued)*

LEDCO, Ltd. (Pennsylvania Limited Partnership) (One Independence Corporation has 1% ownership as General Partner and Tenneco Oil Company has 99% ownership as Limited Partner)	
Operators, Inc. (Delaware) . . . . .	100%
Ship Channel Chemicals Company (Delaware)	100
TENN-USS Chemicals Company (Texas General Partnership) (Ship Channel Chemicals Company has 50% ownership as General Partner)	
TENN-USS Chemicals Finance Corporation (Delaware) . . . . .	50
(100% ownership in TENN-USS Chemicals Company, a Texas Partnership in which Ship Channel Chemicals Company owns 50%)	
Tenneco Exploration, Ltd. (Texas Limited Partnership) (Tenneco Oil Company has 66.66% ownership as General Partner and Tenneco West, Inc. has 33.33% ownership as Limited Partner)	
Tenneco Exploration, Ltd. II (Texas Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco West, Inc. has 50% ownership as Limited Partner)	
Tenneco LaTerre, Inc. (Delaware) . . . . .	100
Tenneco Marine Services, Inc. (Delaware) . . . . .	100
Tenneco OCS Company, Inc. (Delaware) . . . . .	100
Tenneco Oil Pipeline Company (Delaware) . . . . .	100
Tenneco Retail Service Company (Delaware) . . . . .	100
Tenneco Retail Service Company of Texas (Texas) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Tenneco Oil Company (continued)*

Tenneco Storate Limited Partnership (Louisiana Limited Partnership) (Tenneco Oil Company has 50% ownership as General Partner and Tenneco Credit Corporation has 50% ownership as Limited Partner)	
Tenneco Storage Capital Corporation . . . . .	100%
TINCO, Ltd. (Texas Limited Partnership) (Tenneco Oil Company has 56.7% ownership as General Partner and LEDCO, Ltd. has 43.3% ownership as Limited Partner)	
Viscosity Oil Company (Illinois) . . . . .	100
Tenneco Oil Company of Nigeria (Delaware) . . . . .	100
Tenneco Oil of Nigeria Unlimited (Nigeria) . . . . .	50
Tenneco Phosphate, Inc. (Delaware) . . . . .	100
Tenneco Polymers, Inc. (Delaware) . . . . .	100
Tenneco Resins, Inc. (Delaware—in dissolution) . . . . .	100
Tenneco Eastern Realty, Inc. (New Jersey) . . . . .	100
Tenneco Synfuels Company (Delaware) . . . . .	100
Tenneco Uranium, Inc. (Delaware) . . . . .	100
Tenneco Gas Pipeline Corporation (Delaware) . . . . .	100
Tennessee Gas Pipeline Corporation (Delaware) . . . . .	100
Tennessee Overthrust Gas Company (Delaware) . . . . .	100
Tenngasco Corporation (Delaware) . . . . .	100
Creole Gas Pipeline Corporation (Louisiana) . . . . .	100
Tenngasco Exchange Corporation (Delaware) . . . . .	100
Tenngasco Gas Gathering Company (Delaware) . . . . .	100
Tenngasco Gas Supply Company (Delaware) . . . . .	100
HT Gathering Company (Texas) . . . . .	50
Oasis Pipeline Company (Delaware) . . . . .	20
Tenngasco Marketing Corporation (Delaware) . . . . .	100
THC Pipeline Company (Delaware) . . . . .	100
Walker Deutschland GmbH (Germany) . . . . .	100
West Africa Corporation (Delaware) . . . . .	100
Tenneco Oil Company of Nigeria Unlimited (Nigeria) . . . . .	50

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

*Subsidiaries of Tenneco Oil Company (continued)*

Tenneco Delta XII Gas Co., Inc. (Delaware) . . . . .	100%
Tenneco LNG International Inc. (Panama) . . . . .	100
Tenneco Energy Ltd. (Canada) . . . . .	100
Tenneco Foreign Sales Corporation (U.S. Virgin Islands) . . . . .	100
Tenneco International Energy, Inc. (Delaware) . . . . .	100
Tenneco International Inc. (Delaware) . . . . .	100
A B Starla-Werken (Sweden) . . . . .	100
J. I. Case Sweden A.B. (Sweden) . . . . .	100
Sara Gretes Cafeteria AB (Sweden) . . . . .	50
Tenneco Transicol AB (Sweden) . . . . .	100
Case Belgium Inc. (Delaware) . . . . .	100
Case France, S.A. (France) . . . . .	100
Societe Francaise Immobiliere Franim (France) . . . . .	100
Tractorwork Iberica, Inc. (Delaware) . . . . .	100
Case Tracteurs S.A. (France) . . . . .	100
Case Traktoren GmbH (Germany) . . . . .	100
Compania de Financiacion Case, S.A. (Spain) . . . . .	100
Etablissement Robert Bellanger, S.A. (France) . . . . .	100
Speedy Et Cie SNC (France) . . . . .	100
(Etablissement Robert Bellanger, S.A. has 99% ownership and Speedy Inc. has 1% ownership)	
J. I. Case (Australia) Pty., Ltd. (Australia) . . . . .	100
J. I. Case Credit Corporation of Australia Pty. Limited (Australia) . . . . .	100
J. I. Case (Murray Bridge) Pty. Ltd. (Australia) . . . . .	100
J. I. Case Norge A/S (Norway) . . . . .	100
J. I. Case Operations (Europe) Inc. (Delaware) . . . . .	100
J. I. Case S.A. (Spain) . . . . .	100
J. I. Case South Africa (Pty.) Ltd. (South Africa) . . . . .	100
J. I. Case S.W.A. (Proprietary) Ltd. (South West Africa) . . . . .	100
J. I. Case Sweden Inc. (Delaware) . . . . .	100
Monroe Australia Proprietary Limited (Australia) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco Corporation (continued)*

Wylie Superannuation Pty. Ltd. (Australia) . . . . .	100%
Omni-Pac GmbH (Germany) . . . . .	1
Omni-Pac S.A.R.L. (France) . . . . .	97
Poclain do Brasil S.A. (Brazil) . . . . .	100
P.P.M. Guindastes Hidraulicos S.A. (Brazil) . . . . .	99
Riverside Date International, Inc. (Delaware) . . . . .	100
Tunisian American Date Company (Tunisia) . . . . .	49
S.A. Paper Chemicals (Proprietary), Limited (South Africa) . . . . .	60
S.A. Tenneco Belgium (Poclain-Nibrie-Petro-Tex) N. V. (Belgium) . . . . .	100
Somadoc N. V. (Belgium) . . . . .	100
Societe Anonyme Industrielle des Resines (France) . . . . .	100
Speedy Inc. (Delaware) . . . . .	100
Speedy Et Cie SNC (France) (Speedy Inc. has 1% ownership and Etablissement Robert Bellanger, S.A. has 99% ownership)	
Tenneco Australia, Inc. (Delaware) . . . . .	100
Tenneco Automotive Trading Company (Delaware) . . . . .	100
Tenneco Deutschland Beteiligungs GmbH (Germany) . . . . .	100
Case Vibromax GmbH (Germany) . . . . .	98
Case Vibromax GmbH and Co. (Germany) . . . . .	2
Case Vibromax Australia (Pty) Ltd. Vibromax France SARL (France) . . . . .	99
Vibromax SCI (France) . . . . .	99
Omni-Pac GmbH (Germany) . . . . .	99
Omni-Pac ApS (Denmark) . . . . .	100
Omni-Pac A.B. (Sweden) . . . . .	100
Omni-Pac S.A.R.L. (France) . . . . .	3
Pit-Stop Auto Services GmbH (Germany) . . . . .	100
Poclain GmbH (Germany) . . . . .	100
Case Poclain GmbH & Co. (Germany) . . . . .	2
Chance Gesellschaft Fuer Baumachinau MbH . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

Wilhelm Weller, Herstellung und Vertrieb von Strassenwalzen, GmbH (Germany) . . . . .	100%
Vibromax France SARL (France) . . . . .	1
Vibromax SCI (France) . . . . .	1
Tenneco Egypt, Inc. (Delaware) . . . . .	100
Tenneco Far East Exploration and Development Company (Delaware) . . . . .	100
Tenneco Great Britain Limited (United Kingdom) . . . . .	100
Tenneco Holdings B.V. (Netherlands) . . . . .	100
Tenneco Nederland B.V. (Netherlands) . . . . .	100
Case Poclain GmbH & Co. (Germany) . . . . .	98
Chance Gesellschaft Fuer Baumachinau MbH (Germany) . . . . .	100
Gebr. Broere B. V. (Netherlands) . . . . .	100
Antwerp United Tanker Agencies N.V. (Belgium) . . . . .	100
Agence Maritime Eurotank N.V. (Belgium) . . . . .	100
Depositass Del Norte, S.A. (Spain) . . . . .	50
Terminales Quimicos S.A. (Spain) . . . . .	26
Tank Terminals Rotterdam, B.V. (Netherlands) . . . . .	100
Tankvaart Dordrecht, B.V. (Netherlands) . . . . .	100
Case Vibromax GmbH und Co. (Germany) . . . . .	98
Vibromax Australia (Pty) Ltd. (Australia) . . . . .	100
Tenneco Transicol B.V. (Netherlands) . . . . .	100
Nederlandsche Bewoid Maarachappij, B.V. (Netherlands) . . . . .	100
Tenneco Holdings Danmark A/S (Denmark) . . . . .	100
Case Traktori Oy (Finland) . . . . .	100
Finnwalker Oy (Finland) . . . . .	100
Lydex A/S (Denmark) . . . . .	100
J. I. Case A/S (Denmark) . . . . .	100
Handelsselskabet af 12/2/76 Roskilde Aps (Denmark) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

Tenneco International Marketing Company (Delaware) . . . . .	100
Tenneco International N.V. (Netherlands Antilles) . . . . .	100
Tenneco International Trading Company (Delaware) . . . . .	100
Tenneco Norge Inc. (Delaware) . . . . .	100
Tenneco Norway Oil Company (Delaware) . . . . .	100
Tenneco Offshore Netherlands Company (Delaware) . . . . .	100
Tenneco Oil Company of Colombia (Delaware) . . . . .	100
Tenneco Oil Company Norsk A/S (Norway) . . . . .	100
Tenneco Oil Company of the Bahamas (Delaware) . . . . .	100
Tenneco Oil Company of Trinidad (Delaware) . . . . .	100
Tenneco Oil Cote d'Ivoire, Inc. (Delaware) . . . . .	100
Tenneco United Kingdom Holdings Limited (Delaware) . . . . .	100
J. I. Case Europe Limited (Delaware) . . . . .	100
Case Credit Limited (United Kingdom) . . . . .	100
International Harvester Company of Great Britain Limited (United Kingdom) . . . . .	100
Omni-Pac U.K. Limited (United Kingdom) . . . . .	100
Hartmann Fibre Limited (United Kingdom) . . . . .	100
Tenneco Europe Limited (Delaware) . . . . .	100
Tenneco International Finance Limited (United Kingdom) . . . . .	100
Case Credits Limited (United Kingdom) . . . . .	100
Tenneco International Finance BV (Netherlands) . . . . .	100
Tenneco International Holdings Limited (United Kingdom) . . . . .	100
Albright & Wilson Limited (United Kingdom) . . . . .	100
ACC (Fertilisers) Ltd. (United Kingdom) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

FCL Crop Protection, Ltd. (United Kingdom) . . . . .	100
Robt. Stephenson & Son Ltd. (United Kingdom) . . . . .	100
The Farmers Co. Ltd. (United Kingdom) . . . . .	100
Albright & Wilson A.B. (Sweden) . . . . .	100
Albright & Wilson A/S (Norway) . . . . .	100
Albright & Wilson Asia Trading (H.K.) Limited (Hong Kong) . . . . .	100
Albright & Wilson Asia Trading Pie Limited (Singapore) . . . . .	100
AWAT Thai Ltd. (Thailand) . . . . .	49
Albright & Wilson Asia Trading Sdn Bhd (Malaysia) . . . . .	100
Albright & Wilson ESP Trustees Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Executive Pension Trustees, Ltd. (United Kingdom) . . . . .	100
Albright & Wilson GmbH (Austria) . . . . .	100
Albright & Wilson Intertrade Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Investments (PTY) Ltd. (Australia) . . . . .	100
Albright & Wilson (Australia) Limited (Australia) . . . . .	57
National Brands (PTY), Ltd. (Australia) . . . . .	100
Albright & Wilson New Zealand Limited (New Zealand) . . . . .	100
Albright & Wilson (Langley) Ltd. (United Kingdom) . . . . .	100
Albright & Wilson (Malaysia) SDN, BHD. (Malaysia) . . . . .	100
Albright & Wilson (Marchon) Pte. Limited (Singapore) . . . . .	100
Ethoxylates Manufacturing Pte. Ltd. (Singapore) . . . . .	49

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Albright & Wilson Limited (continued)*

*Subsidiaries of Albright & Wilson Overseas Ltd. (continued)*

Albright & Wilson Match Phosphorous Co. Ltd. (United Kingdom) . . . . .	100%
Albright & Wilson (Mfg.) Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Oils SDN BHD (Malaysia) . . . . .	100
Albright & Wilson Overseas Ltd. (United Kingdom) . . . . .	100
Akulu Marchon (PTY) Ltd. (South Africa) . . . . .	50
Akulu Chemicals (PTY) Ltd. (South Africa) . . . . .	100
Marchon-Paragon Holdings (PTY) Ltd. (South Africa) . . . . .	100
Marchon-Paragon Sulphonation (PTY) Ltd. (South Africa) . . . . .	50
Albright & Wilson Aps (Denmark) . . . . .	100
Albright & Wilson BV (Netherlands) . . . . .	100
Albright & Wilson GmbH (Germany) . . . . .	100
Albright & Wilson International Finance BV (Netherlands) . . . . .	100
Albright & Wilson Ireland Ltd. (Eire) . . . . .	100
Albright & Wilson Northern Ireland, Ltd. (United Kingdom) . . . . .	100
Ibex Ltd. (Ireland) . . . . .	100
Thawpit (Ireland) Ltd. (Ireland) . . . . .	100
Albert & Wilson SpA (Italy) . . . . .	100
Marchon Espanola S.A. (Spain) . . . . .	100
Marchon France S.A. (France) . . . . .	100
Marchon Hellas Ltd. (Greek) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom*

*Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Albright & Wilson Limited (continued)*

*Subsidiaries of Albright & Wilson*

*Overseas Ltd. (continued)*

Marchon Italians SpA (Italy) . . . .	100%
Marchon Sud SpA (Italy) . . . . .	100
Polyphosphates Inc. (Philippines) . . . .	40
Albright & Wilson Pension Investments Ltd. (England) . . . . .	100
Albright & Wilson Produtos Quimicos Ltda. (Brazil) . . . . .	100
Albright & Wilson Resins and Organics Limited (United Kingdom) . . . . .	100
Albright & Wilson (Sandwell) Ltd. (United Kingdom) . . . . .	100
E. P. Potter & Co. Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Staff Pension Trustees Ltd. (United Kingdom) . . . . .	100
Albright & Wilson (Warley) Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Works Pension Trustees Ltd. (United Kingdom) . . . . .	100
Albright & Wilson Dentifrice Phosphates Sdn. Bhd. (Malaysia) . . . . .	100
Albright, Morarji and Pandit Limited (India) . . . . .	39.9
Astoria Shipping & Transport Co., Ltd. (United Kingdom) . . . . .	100
Cambray Ltd. (United Kingdom) . . . . .	100
Clifford Christopherson & Co., Ltd. (United Kingdom) . . . . .	100
Cumbria Trading Co., Ltd. (United Kingdom) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom*

*Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Albright & Wilson Limited (continued)*

*Detergent Chemical Limited (United*

Kingdom) . . . . .	100%
Electropol Ltd. (United Kingdom) . . .	100
General Phosphates Co. Ltd. (United Kingdom) . . . . .	100
Leo Lines, Ltd. (United Kingdom) . . .	100
Mallison Feeds, Ltd. (United Kingdom) . . . . .	100
Marchon Products, Ltd. (United Kingdom) . . . . .	100
Mays Chemical Manure Co., Ltd. (United Kingdom) . . . . .	100
Mortimer Investment Co. Limited (United Kingdom) . . . . .	100
Proban Ltd. (United Kingdom) . . . . .	100
Solway Chemicals, Ltd. (United Kingdom) . . . . .	100
Stockport United Chemical Co. Ltd. (United Kingdom) . . . . .	100
Tenneco Malros Ltd. (United Kingdom) . . . . .	100
Tenneco Organics Ltd. (United Kingdom) . . . . .	100
Butler (1943) Ltd. (United Kingdom) . . . . .	50
(50% owned by Petrofina (U.K.) Limited a non-Tenneco company)	
Armdale Fuels Ltd. (United Kingdom) . . . . .	100
Butler Oil Produce Ltd. (United Kingdom) . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom*

*Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Albright & Wilson Limited (continued)*

Croft Oils Limited (United Kingdom) . . . . .	100%
Elston Oils Limited (United Kingdom) . . . . .	100
Gough Oils Limited (United Kingdom) . . . . .	100
John Oils Limited (United Kingdom) . . . . .	100
Compass Chemical Company, Ltd. (United Kingdom) . . . . .	100
The Scottish Chemical Co., Ltd. (United Kingdom) . . . . .	100
Thai Polyphosphate & Chemicals Co. Ltd. (Thailand) . . . . .	30
Thomas Tyrer & Co. Ltd. (United Kingdom) . . . . .	100
Case-Poclain Limited (United Kingdom) . . . . .	100
David Brown Tractors Limited (United Kingdom) . . . . .	100
David Brown Tractors (Belfast) Ltd. (United Kingdom) . . . . .	100
David Brown Tractors (Ireland) Ltd. (Ireland) . . . . .	100
David Brown Tractors (Retail) Ltd. (United Kingdom) . . . . .	100
A.M. Exports Limited (United Kingdom) . . . . .	100
Poclain Limited (United Kingdom) . . . . .	100
Tractorwork, Limited (United Kingdom) . . . . .	100
Harmo Industries, Ltd. (United Kingdom) . . . . .	100

*Subsidiaries of Tenneco Inc. (continued)*

*Subsidiaries of Tenneco International Inc. (continued)*

*Subsidiaries of Tenneco United Kingdom*

*Holdings Limited (continued)*

*Subsidiaries of Tenneco International Holdings Limited (continued)*

*Subsidiaries of Harmo Industries, Ltd. (continued)*

Birmingham Filters Limited (United Kingdom) . . . . .	100%
Brames Limited (United Kingdom) . . . . .	100
D. P. Miller & Sons Limited (United Kingdom) . . . . .	100
Harmo Pressings Limited (United Kingdom) . . . . .	100
Harmo Steel Co. Limited (United Kingdom) . . . . .	100
Harmo Tubes Limited (United Kingdom) . . . . .	100
F. Mould Limited (United Kingdom) . . . . .	100
F. Mould (Silencers) Limited (United Kingdom) . . . . .	100
J. W. Hartley (Motor Trade) Limited (United Kingdom) . . . . .	100
Fisher & Mould Limited (United Kingdom) . . . . .	100
Harmo Auto Services (Export) Limited (United Kingdom) . . . . .	100
Harmo Auto Services Limited (United Kingdom) . . . . .	100
Harmo Export Ltd. (United Kingdom) . . . . .	100
Harmo Filters Limited (United Kingdom) . . . . .	100
Harmo Technical Development Limited (United Kingdom) . . . . .	100
Steering & Suspension Limited (United Kingdom) . . . . .	100
Karobes Limited (United Kingdom) . . . . .	100
Midland Trim & Equipment Ltd. (United Kingdom) . . . . .	100

<i>Subsidiaries of Tenneco Inc. (continued)</i>	
<i>Subsidiaries of Tenneco International Inc. (continued)</i>	
<i>Subsidiaries of Tenneco United Kingdom Holdings Limited (continued)</i>	
<i>Subsidiaries of Tenneco International Holdings Limited (continued)</i>	
<i>Subsidiaries of Harro Industries, Ltd. (continued)</i>	
The Harro Engineering Co. Limited (United Kingdom) .....	100%
Houston Data Venture (U.K.) Limited (United Kingdom) .....	100
J. I. Case Company Limited (United Kingdom) .....	100
Monroe Auto Equipment U.K. Limited (United Kingdom) .....	100
Tees Storage Company Limited (United Kingdom) .....	50
Tenneco-Walker (U.K.) Limited (United Kingdom) .....	100
Tenneco West Limited (United Kingdom) ..	100
Tenneco United Kingdom, Inc. (Delaware) .....	100
Tenneco Venezuela, Inc. (Delaware) .....	100
Thompson and Stammers (Dunmow) Limited (United Kingdom) .....	100
Universaltrac Beteiligungs GmbH (Germany) .....	100
Interactor Viehmann GmbH & Co. (Germany) .....	50
Intertractor A.G. (Switzerland) .....	100
Intertractor America Corporation (Delaware) ..	100
Intertractor G.B. Ltd. (United Kingdom) .....	100
Intertractor Italiana S.R.L. (Italy) .....	100
Walker Europe, Inc. (Delaware) .....	100
Walker Norge A/S (Norway) .....	100
Tenneco LNG Inc. (Delaware) .....	100
Tenneco Norway LNG Inc. (Delaware) .....	100
Tenneco Realty, Inc. (Delaware) .....	100
First National Services, Inc. (Delaware) .....	100
Immobiliaria Belgrado, S.A. (Mexico) .....	100
Ten Ten Travis Corporation (Delaware) .....	100

<i>Subsidiaries of Tenneco Inc. (continued)</i>	
<i>Subsidiaries of Tenneco Realty, Inc. (continued)</i>	
Tennchase, Inc. (Texas) .....	100
Tenneco Realty Development Corporation (Delaware) .....	100
Meadows of the Kern Mutual Water Company (California) .....	100
Stockdale Coffee Company (California) .....	100
Tenneco Arizona Property Corporation .....	100
Tenneco Property Corporation (California) ..	100
Tenneco Realty Development Holding Corporation (Delaware) .....	100
Uplands of the Kern Mutual Water Company (California) .....	100
Tennessee Gas Building Corporation (Delaware) ..	100
TRI Realty, Inc. (Texas) .....	100
Tenneco Shale Oil Company (Delaware) .....	100
Tenneco SNG Inc. (Delaware) .....	100
Tenneco Trinidad LNG, Inc. (Delaware) .....	100
Tenneco Ventures Inc. (Delaware) .....	100
Tennessee Gas Marketing Company (Delaware) .....	100
Tennessee Gas Services, Inc. (Delaware) .....	100
Tennessee Gas Transmission Company (Delaware) ..	100
Tennessee Iroquois Gas Company (Delaware) .....	100
Tennessee Niagara Gas Company (Delaware) .....	100
Tennessee Ozark Gas Company (Delaware) .....	100
Tennessee Storage Company (Delaware) .....	100
Tennessee Trailblazer Gas Company (Delaware) .....	100
Walker Manufacturing Company (Delaware) .....	100
Walker Marketing Corporation (Wisconsin) .....	100

## ASSOCIATED GAS DISTRIBUTORS

AGD is an informal association of East Coast local natural gas distribution companies. The members of AGD and their parent companies, subsidiaries, and affiliates are listed as follows:

### Atlanta Gas Light Company\*

#### Subsidiaries:

- Georgia Gas Company
- Georgia Engine Sales & Service
- Trustees Investments, Inc.
- Georgia Natural Gas Company
- Georgia Gas Service Company
- Georgia Energy Company

### Baltimore Gas & Electric Company\*

#### Subsidiaries:

- BNG, Inc.
- Constellation Holdings, Inc.
- Constellation Investments, Inc.
- Constellation Properties, Inc.

#### Affiliate:

- Safe Harbor Water Power Corporation

### Bay State Gas Company\*

#### Subsidiaries:

- Bay State Exploration, Inc.
- Bay State Gas Supply, Inc.
- Northern Utilities, Inc.
- Granite State Gas Transmission, Inc.

### The Berkshire Gas Company\*

### Boston Gas Company

Parent: Eastern Gas and Fuel Associates

---

\*Denotes publicly owned member or parent company.

### The Brooklyn Union Gas Company\*

#### Subsidiaries:

- Fuel Resources, Inc.
- Fuel Resources Gathering, Inc.
- Brooklyn Union Exploration Company, Inc.
- Gas Energy, Inc.
- Methane Development Corporation
- Collectaccount Services, Inc.
- Star Enterprises, Inc.
- Delaware Valley Propane Company

### Central Hudson Gas & Electric Corporation\*

#### Subsidiaries:

- Central Hudson Enterprises Corp.
- Central Hudson Cogeneration, Inc.
- CH Resources, Inc.
- Greene Point Development Corp.
- Phoenix Development Co., Inc.

### Chesapeake Utilities Corporation

#### Subsidiaries:

- Central Florida Gas Co.
- Eastern Shore Natural Gas Co.
- Dover Exploration Co.
- Skipjack, Inc.
- Sharpgas, Inc.

City of Holyoke, Mass., Gas & Electric Department

City of Norwich, Department of Public Utilities

City of Westfield Gas & Electric Light Department

### Colonial Gas Company\*

#### Subsidiaries:

- Transgas, Inc. (Mass)
- Massachusetts Associates, Inc. (Mass)

---

\*Denotes publicly owned member or parent company.

Commonwealth Gas Co.

Parent: Commonwealth Energy System\*

Concord Natural Gas Corporation

Subsidiary: Concord Gas Service Corp.

Consolidated Edison Company of New York, Inc.\*

Delmarva Power & Light Company\*

Subsidiaries:

Delmarva Energy Company

Delmarva Industries, Inc.

Delmarva Capital Investments, Inc.

DCI I, Inc.

DCI II, Inc.

Elizabethtown Gas Company

Parent: NUI Corporation\*

EnergyNorth, Inc.\*

Subsidiaries:

EnergyNorth Realty, Inc.

Gas Service, Inc.

Energy Resources Corp.

Manchester Gas Co.

Concord Natural Gas Corp.

Concord Gas Service Corp.

Rent-A-Space of New England, Inc.

Essex County Gas Company

Fitchburg Gas & Electric Light Company\*

Subsidiary: Fitchburg Energy Development Co.

Lynchburg Gas Company

Subsidiary: Lynco Development Corp.

New Jersey Natural Gas Company

Parent: New Jersey Resources Corporation\*

---

\*Denotes publicly owned member or parent company.

New York State Electric & Gas Corporation\*

Subsidiary: Somerset Railroad Corporation

North Carolina Natural Gas Corporation

Subsidiaries:

NCNG Exploration Corp.

Cape Fear Energy Corp.

Northeast Utilities\*

Subsidiaries:

The Connecticut Light and Power Company

Western Massachusetts Electric Company

Holyoke Water Power Company

Northeast Nuclear Energy Company

The Rocky River Realty Company

The Quinnehtuk Company

Northeast Utilities Service Company

Northern Utilities, Inc. (see Bay State Gas Company)

Pennsylvania Gas & Water Company

Parent: Pennsylvania Enterprises, Inc.

Pequot Gas Co.

Philadelphia Electric Company\*

Subsidiaries:

Adwin Equipment Company

Adwin Realty Company

Conowingo Power Company

Eastern Pennsylvania Development Company

Eastern Pennsylvania Exploration Company

Philadelphia Electric Power Company

The Susquehanna Electric Company

The Susquehanna Power Company

Philadelphia Gas Works

---

\*Denotes publicly owned member or parent company.

Providence Gas Company

Parent: Providence Energy Corporation\*

Public Service Company of North Carolina, Inc.\*

Subsidiary:

PSNC Natural Resources Corporation  
Tar Heel Energy Corp.  
PSNC Production Corp.  
PSNC Exploration Corp.  
PSNC Propane Corp.

Public Service Electric & Gas Company\*

Subsidiaries:

Energy Pipeline Corporation  
Energy Terminal Services Corporation  
Mulberry Street Urban Renewal Corporation  
PSE&G Overseas Finance N.V.  
PSE&G Research Corporation  
Public Services Resources Corp.  
Community Energy Alternatives, Inc.  
Energy Development Corporation  
Gasdel Pipeline System, Inc.

South County Gas Co.

South Jersey Gas Co.

Parent: South Jersey Industries, Inc.\*

The Southern Connecticut Gas Co.

Parent: Connecticut Energy Corp.\*

UGI Corporation\*

Subsidiaries:

AmeriGas, Inc.  
AP Propane  
AmeriGas II, Inc.  
Schwartz Carbonic Company  
Industrial Gases, Inc.  
Picar, Inc.

---

\*Denotes publicly owned member or parent company.

UGI Corporation\* (continued)

Subsidiaries:

Amerilease, Inc.  
ANSUTECH, Inc.  
Matheson Gas Products, Inc.  
Matheson Gas Products Canada, Inc.  
UGI Development Company  
Ashtola Production Company  
International Petroleum Service Company  
Keystone Oilfield Supply Co.  
Stimwell Services Company  
B&L Services Company  
Universal Well Services, Inc.  
Target Cementing Co.  
UGID Holding Company  
Triad Drilling Company  
Union Supply Company  
Wellhead Compressor Packagers Company  
Wellhead Finance Co.  
Cryotex, Inc.  
Heavy Media, Inc.  
Four Flags Drilling Company, Inc.  
Tri-Four, Inc.  
UGID Drilling Company  
UGID Drilling Investing Company  
UGI Ethanol Development Corporation  
SAM's Well Service, Inc.  
Development Leasing Corporation  
Physicians Technology Corporation  
Capital Housing, Inc.  
Skyten Corporation  
UGI Realty Company  
UGI Finance N.V.

Valley Gas Co.

Parent: Valley Resources, Inc.\*

---

\*Denotes publicly owned member or parent company.

Washington Gas Light Co.\*

Subsidiaries:

Crab Run Gas Co.  
 Davenport Insulation, Incorporated  
 Frederick Gas Co., Inc.  
 Hampshire Gas Co.  
 Shenandoah Gas Co.  
 Brandywood Estates, Inc.  
 Washington Gas Approved Services, Inc.  
 Rock Creek Properties, Inc.  
 Utilitrol

The following are subsidiaries or affiliates of Panhandle Eastern Pipe Line Company:

CORPORATION	PARENT COMPANY
Centana Energy Corporation	PEC
Dixilyn-Field Drilling Company	PEC
Energy Pipelines International Company	PEC
Indiana-Ohio Pipeline Company	PEC
Lachmar	DEL Partnership
Mantaray Pipeline Company	PEC
Morgas, Inc.	PEC
National Helium Corporation	CEC
Pan Alaskan Gas Company	PEC
Pan Border Gas Company	PEPL
Pan Eastern Coal Company	PEC
Pan Gas Storage Company	PEPL
Pan National Gas Sales, Inc.	PEC
Pan Transportation, Inc.	PEC
Panhandle Canadian Gas, Limited	PEPL
Panhandle Eastern Corporation	Parent Company
Panhandle Eastern Pipe Line Company	PEC
Panhandle Trading Company	PEC
Panmark Gas Company	PEPL
Pantheon, Inc.	PEC
Pelmar Company	PEC
Portal Sales, Inc.	PEC
Source Cogeneration Company, Inc.	PEC
Southwest Gas Storage Corporation	PEPL
Stingray Pipeline Company	La Partnership
Trunkline Gas Company	PEPL
Trunkline LNG Company	PEC
Trunkline Offshore Company	TGC
Youghiogheny and Ohio Coal Company, The	PEC

\*Denotes publicly owned member or parent company.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION,  
*Petitioner,*

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

PUBLIC SERVICE COMMISSION OF NEW YORK, *et al.*,  
*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

On Writs of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

**BRIEF FOR RESPONDENTS MARTIN EXPLORATION  
MANAGEMENT COMPANY, ET AL.**

*Counsel for Respondents  
Martin Exploration  
Management Company and  
Colorado Energy Corporation*

[Counsel for Additional  
Respondents are listed inside]

Dated: February 16, 1988

JEFFREY S. DAVIDSON  
Counsel of Record  
STEPHEN A. HERMAN, P.C.  
JAMES D. SENGER  
YOSEF J. RIEMER  
KIRKLAND & ELLIS  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 879-5000

5588

**AMOCO PRODUCTION COMPANY**

**WILLIAM T. BENHAM \***  
200 East Randolph Drive  
P.O. Box 5910-A  
Chicago, Illinois 60680  
(312) 876-7941

**BHP PETROLEUM COMPANY, INC.**

**WILLIAM S. MARTIN \***  
5051 Westheimer  
1300 Post Oak Tower  
Houston, Texas 77056  
(713) 780-5313

**CITIES SERVICE OIL & GAS CORP.**

**MICHAEL L. PATE \***  
P.O. Box 300  
Tulsa, Oklahoma 74102  
(918) 561-4541

**GRACE PETROLEUM CORPORATION**

**CHARLES H. SHONEMAN \***  
**BRACEWELL & PATTERSON**  
2000 K St., N.W., Suite 500  
Washington, D.C. 20006-1809  
(202) 828-5800

**OHIO OIL AND GAS ASSOCIATION**

**M. HOWARD PETRICOFF \***  
**W. JOHNATHAN AIREY**  
**VORYS, SATER, SEYMOUR**  
**AND PEACE**  
52 East Gay St.  
Columbus, Ohio 43215  
(614) 464-5414

**PHILLIPS PETROLEUM COMPANY**

**JOHN L. WILLIFORD**  
**CHARLES L. PAIN \***  
1258 Adams Building  
Bartlesville, Oklahoma 74004  
(918) 661-6355

**ARCO OIL AND GAS COMPANY**

**HARRIS S. WOOD \***  
P.O. Box 2819  
Dallas, Texas 75221  
(214) 880-4869

**CHEVRON U.S.A., INC.**

**JAMES B. ATKIN \***  
**DAVID J. EVANS**  
**PILLSBURY, MADISON & SUTRO**  
1667 K St., N.W., Suite 1100  
Washington, D.C. 20006  
(202) 887-0300

**EXXON CORPORATION**

**C. ROGER HOFFMAN**  
**DOUGLAS W. RASCH \***  
P.O. Box 2180  
Houston, Texas 77001  
(713) 656-1691

**INDEPENDENT OIL AND GAS**

**ASSOCIATION OF WEST VIRGINIA**  
**R. GORDON GOOCH \***  
**TRAVIS AND GOOCH**  
1101 15th St., N.W., Suite 1200  
P.O. Box 65688  
Washington, D.C. 20035-5688  
(202) 457-9100

**PLACID OIL COMPANY**

**RONALD D. HURST \***  
**PAUL W. HICKS**  
3900 Thanksgiving Tower  
Dallas, Texas 75201  
(214) 880-1000

**PENNZOIL COMPANY**

**JOHN B. CHAPMAN \***  
**KATHELENE E. MAGRUDER**  
Pennzoil Place  
700 Milam Street  
Houston, Texas 77002  
(713) 546-8859

**JOHN McDONALD**  
**RICHARD E. POWERS, JR.**  
**BUTLER & BINION**  
1747 Pennsylvania Ave., N.W.  
Washington, D.C. 20005  
(202) 466-6900

**TEXAS OIL COMPANY OF**

**DAVID J. BENNETT**  
**KEVIN J. BROWN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**

**SHELL OFFSHORE INC.**

**SHELL OIL COMPANY**  
**THOMAS H. JONES**  
**ONE SHELL PLACE**  
**HOUSTON, TEXAS 77001**  
**713 214-3712**

**DAVID J. BENNETT**

**CONSTANCE H. CHAMMAN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**  
**JOHN J. BROWN**

**CONSTANCE H. CHAMMAN**

### QUESTION PRESENTED

Section 101(b)(5) of the Natural Gas Policy Act of 1978 states that whenever natural gas is qualified in two NGPA pricing categories—one providing a “maximum lawful price,” the other providing an “exemption from such a price”—the category “which could result in the highest price shall be applicable.” 15 U.S.C. § 3311(b)(5).

This case presents the question of whether FERC may preclude producers from pricing and selling such dually-qualified gas in a category providing a “maximum lawful price” when that category results in the highest sale price.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	v
STATEMENT .....	1
A. The Natural Gas Policy Act .....	3
B. Natural Gas Category Determinations .....	10
C. Order Nos. 406 and 406-A .....	11
D. The Court of Appeals' Decision .....	14
SUMMARY OF ARGUMENT .....	17
ARGUMENT .....	20
A. The Court of Appeals Correctly Concluded That When "Sales Qualify Under More Than One Provision," Section 101(b)(5) Requires That the Provision Which Could Result in the High- est Sale Price Shall Apply .....	21
B. Congress Intended for the Provision Which Could Result in the Highest Sale Price to Ap- ply .....	26
1. The Legislative Statements on Section 101(b)(5) Show That Congress Intended To Treat Dually-Qualified Gas in the Cate- gory Which Could Result in the Highest Sale Price .....	26
2. The "Broad Purposes" of the NGPA Sup- port Congress' Decision To Treat Dually- Qualified Gas in the Category Which Could Result in the Highest Sale Price .....	30
3. Changes in Economic Conditions Do Not Provide FERC with a License To Rewrite the Statute .....	34

## TABLE OF CONTENTS—Continued

	Page
C. Because Congress Has Manifested Its Intent in Section 101(b)(5), the Court Should Not Defer to a Contrary Interpretation of the Agency....	36
D. Section 121 Does Not Override or Nullify the Meaning of Section 101(b)(5) .....	37
E. The Court of Appeals Correctly Concluded That FERC Has No Authority To "Automatically" or "Implicitly" Qualify New Tight Formation Gas as New Gas Under Section 102(c) or 103....	38
CONCLUSION .....	43

## TABLE OF AUTHORITIES

Cases:	Page
<i>Amoco Production Co. v. Western Slope Gas Co.</i> , 754 F.2d 303 (10th Cir. 1985) .....	6
<i>Board of Governors v. Dimension Financial Corp.</i> , 474 U.S. 361 (1986) .....	passim
<i>Campbell v. Galeno Chemical Co.</i> , 281 U.S. 599 (1930) .....	42
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984) .....	36
<i>Eccc, Inc. v. FERC</i> , 645 F.2d 339 (5th Cir. 1981) ..	7
<i>Federal Maritime Comm'n v. Seatrain Lines, Inc.</i> , 411 U.S. 726 (1973) .....	42
<i>Griffin v. United States</i> , 537 F.2d 1130 (Temp. Emer. Ct. App.), cert. denied, 429 U.S. 919 (1976) .....	23
<i>Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.</i> , 108 S. Ct. 376 (1987) .....	22
<i>INS v. Cardoza-Fonseca</i> , 107 S. Ct. 1207 (1987) ..	26, 30, 36
<i>International Ry. v. Davidson</i> , 257 U.S. 506 (1922) .....	42
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803) .....	42
<i>North Haven Bd. of Education v. Bell</i> , 456 U.S. 512 (1982) .....	22
<i>Oklahoma v. FERC</i> , 661 F.2d 832 (10th Cir. 1981), cert. denied, 457 U.S. 1105 (1982) .....	6
<i>Pennzoil Co. v. FERC</i> , 645 F.2d 360 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982) .....	5, 9
<i>Peters v. Hobby</i> , 349 U.S. 331 (1955) .....	42
<i>Public Service Comm'n v. Mid-Louisiana Gas Co.</i> , 463 U.S. 319 (1983) .....	passim
<i>Singer v. Wadman</i> , 745 F.2d 606 (10th Cir. 1984), cert. denied, 470 U.S. 1028 (1985) .....	41
<i>Stark v. Wickard</i> , 321 U.S. 288 (1944) .....	42
<i>TVA v. Hill</i> , 437 U.S. 153 (1978) .....	26, 34
<i>Transcontinental Gas Pipe Line Corp. v. State Oil &amp; Gas Board</i> , 474 U.S. 409 (1986) .....	passim
<i>United States v. James</i> , 106 S. Ct. 3116 (1986) ..	21, 24, 26, 36

## TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Locke</i> , 471 U.S. 84 (1985).....	21, 35
<i>United States v. Menasche</i> , 348 U.S. 528 (1955) ..	23
<i>United States v. Naftalin</i> , 441 U.S. 768 (1979)....	22
<i>United States v. Wickersham</i> , 201 U.S. 390 (1906) .....	42
<i>Williston Basin Interstate Pipeline Co. v. FERC</i> , 816 F.2d 777 (D.C. Cir. 1987), <i>cert. denied</i> , 108 S. Ct. 748 (1988) .....	11, 39, 41
<i>Statutes &amp; Regulations:</i>	
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301- 3432 (1982) .....	<i>passim</i>
Section 101 (b), 15 U.S.C. § 3311 (b) .....	8, 32
Section 101 (b) (5), 15 U.S.C. § 3311 (b) (5) .....	<i>passim</i>
Section 101 (b) (9), 15 U.S.C. § 3311 (b) (9) .....	<i>passim</i>
Section 102, 15 U.S.C. § 3312 .....	<i>passim</i>
Section 103, 15 U.S.C. § 3313 .....	<i>passim</i>
Section 104, 15 U.S.C. § 3314 .....	<i>passim</i>
Section 104 (b) (2), 15 U.S.C. § 3314 (b) (2) .....	15-16
Section 105, 15 U.S.C. § 3315 .....	6, 7
Section 105 (b) (3), 15 U.S.C. § 3315 (b) (3) .....	29
Section 106, 15 U.S.C. § 3316 .....	6
Section 107, 15 U.S.C. § 3317 .....	6, 7
Section 107 (b), 15 U.S.C. § 3317 (b) .....	16
Section 107 (c), 15 U.S.C. § 3317 (c) .....	39
Section 107 (c) (1), 15 U.S.C. § 3317 (c) (1) .....	8
Section 107 (c) (2), 15 U.S.C. § 3317 (c) (2) .....	8
Section 107 (c) (3), 15 U.S.C. § 3317 (c) (3) .....	8
Section 107 (c) (4), 15 U.S.C. § 3317 (c) (4) .....	8
Section 107 (c) (5), 15 U.S.C. § 3317 (c) (5) .....	<i>passim</i>
Section 108, 15 U.S.C. § 3318 .....	<i>passim</i>
Section 109, 15 U.S.C. § 3319 .....	6
Section 121, 15 U.S.C. § 3331 .....	<i>passim</i>
Section 121 (a), 15 U.S.C. § 3331 (a) .....	8
Section 121 (b), 15 U.S.C. § 3331 (b) .....	8
Section 121 (c), 15 U.S.C. § 3331 (c) .....	8
Section 121 (e), 15 U.S.C. § 3331 (e) .....	28
Section 503, 15 U.S.C. § 3413 .....	20, 42

## TABLE OF AUTHORITIES—Continued

	Page
Section 503 (c), 15 U.S.C. § 3413 (c) .....	11
Section 503 (c) (1), 15 U.S.C. § 3413 (c) (1) .....	39
Section 503 (c) (2) (A), 15 U.S.C. § 3413 (c) (2) (A) .....	39
Natural Gas Act, 15 U.S.C. §§ 717-717w (1982) ..	3
Crude Oil Windfall Profits Tax Act of 1980, 26 U.S.C. § 29 (a) (Supp. II 1984) .....	33
26 U.S.C. § 29 (c) (Supp. II 1984) .....	33
26 U.S.C. § 29 (c) (2) (B) (Supp. II 1984) .....	33
26 U.S.C. § 29 (e) (Supp. II 1984) .....	33
18 C.F.R. § 270.208 (1987) .....	12
Interim Rule Covering High-Cost Natural Gas Produced from Tight Formations, 45 Fed. Reg. 13,414 (1980) .....	15, 37-38
53 Fed. Reg. 3,019 (1988) .....	20, 31
53 Fed. Reg. 3,754 (1988) .....	23, 33
<i>Legislative Material:</i>	
H.R. Conf. Rep. No. 1752, 95th Cong., 2d Sess., <i>reprinted in</i> 1978 U.S. Code Cong. & Admin. News 8983 .....	<i>passim</i>
H.R. 8444, 95th Cong., 1st Sess. (1977) .....	4
S. 2104, 95th Cong., 1st Sess., 123 Cong. Rec. 32,306 (1977) .....	5
124 Cong. Rec. 17,481 (1978) .....	39, 40
124 Cong. Rec. 28,589 (1978) .....	7
124 Cong. Rec. 28,633 (1978) .....	7
124 Cong. Rec. 28,634 (1978) .....	5
124 Cong. Rec. 28,635 (1978) .....	5
124 Cong. Rec. 28,879 (1978) .....	34
124 Cong. Rec. 28,882 (1978) .....	5
124 Cong. Rec. 28,891 (1978) .....	4
124 Cong. Rec. 29,109 (1978) .....	40
124 Cong. Rec. 31,387 (1978) .....	29
124 Cong. Rec. 31,819 (1978) .....	29
124 Cong. Rec. 31,838 (1978) .....	5
124 Cong. Rec. 31,839 (1978) .....	5
124 Cong. Rec. 31,842 (1978) .....	5

## TABLE OF AUTHORITIES—Continued

	Page
124 Cong. Rec. 31,843 (1978) .....	5
124 Cong. Rec. 31,844 (1978) .....	5
124 Cong. Rec. 31,845 (1978) .....	34
124 Cong. Rec. 38,361 (1978) .....	29
124 Cong. Rec. 38,363 (1978) .....	26, 27, 39, 40
124 Cong. Rec. 38,364 (1978) .....	<i>passim</i>

*Other Material:*

A. Tussing & C. Barlow, <i>The Natural Gas Industry: Evolution, Structure &amp; Economics</i> 114-16 (1984) .....	21
2A C. Sands, <i>Sutherland Statutory Construction</i> (4th rev. ed. 1981) .....	23, 25-26, 37
Note, <i>Legislative History of the Natural Gas Policy Act: Title I</i> , 59 Tex. L. Rev. 101 (1980) .....	<i>passim</i>
Sup. Ct. R. 28.1 .....	2

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

---

 No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION,  
*Petitioner,*  
 v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

---

 No. 87-364

PUBLIC SERVICE COMMISSION OF NEW YORK, *et al.*,  
*Petitioners,*  
 v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

---

On Writs of Certiorari to the United States  
 Court of Appeals for the Tenth Circuit

---

BRIEF FOR RESPONDENTS MARTIN EXPLORATION  
 MANAGEMENT COMPANY, ET AL.

---

STATEMENT

This case presents the question of whether the incentive price for price-regulated natural gas will continue to "be applicable" to such gas under the terms of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982), if the gas also qualifies in a price-deregulated category. It does not involve an attempt to "choose"

price-regulation over price-deregulation. Pet. Br. 3.<sup>1</sup> It does not involve an attempt to "switch back and forth" between price-regulation and price-deregulation. Pet. Br. 28. Instead, it involves an attempt to determine the "applicable" NGPA pricing category for dually-qualified natural gas, so as to permit private contract pricing provisions to determine the proper sale price.

Section 101(b)(5) of the NGPA determines the "applicable" NGPA pricing category for dually-qualified gas:

**Sales qualifying under more than one provision.** If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b)(5).

This case turns on the meaning of these words. Do they evince an intent to establish a rule requiring that the price-deregulated category always apply? Or do they evince an intent to place dually-qualified gas in the category which results in the highest sale price?

FERC has taken the former position. Approaching the issue with its own agenda, FERC argues that Congress meant for the price-deregulated category to always apply, but rather than simply saying that, chose instead to point to the category "which could result in the highest price" on the belief that contracting parties would com-

<sup>1</sup> "Pet. Br." refers to the brief of Petitioner Federal Energy Regulatory Commission in No. 87-363. "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-363. The statement of the parties to these proceedings, pursuant to Sup. Ct. R. 28.1, appears at pp. i-ii and the addendum to the "Brief in Opposition to Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit," filed October 30, 1987.

pare the existing "maximum lawful price" for the price-regulated category (a finite sum) to the theoretical "maximum" price for the price-deregulated category (an infinite sum) and reach the same result in every case. Pet. App. 111a; Pet. Br. 22. Since the infinite sum is always "highest," the price-deregulated category always applies. *Id.*

A unanimous panel of the United States Court of Appeals rejected this interpretation. Pet. App. 1a-33a. Based on the unambiguous language of section 101(b)(5), the court held that Congress did not intend to require a pointless, one-sided "comparison" of the finite to the infinite. Pet. App. 16a. Instead, the court found that Congress intended to place dually-qualified gas in the category which resulted in the highest sales price under the terms of the prevailing gas sales contract. Pet. App. 16a. If the contract pricing provisions establish a higher price for price-regulated than price-deregulated gas, the regulated pricing category "shall be applicable." 15 U.S.C. § 3311(b)(5).

#### A. The Natural Gas Policy Act.

The Natural Gas Policy Act contains carefully worded compromise legislation, meticulously crafted during sixteen months of discussion and debate. 15 U.S.C. §§ 3301-3432; see generally Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101 (1980). The final statute reflects "the product of a Conference Committee's careful reconciliation of two strong, but divergent, responses to the natural gas shortage." *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983). At the time of the NGPA, the nation faced a "serious production shortage[]" as a result of the pricing policies implemented by FERC's predecessor, the Federal Power Commission ("FPC"), under the terms of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w (1982). *Mid-Louisiana*, 463 U.S. at 330;

*Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 420 (1986). Interstate gas prices, which the FPC had determined on a "historical-cost-based," multi-tiered "rate scheme," remained "substantially below the unregulated prices available for intrastate sales, and the interstate supply remained inadequate." *Mid-Louisiana*, 463 U.S. at 330-31. As a result, the interstate market had begun to command supplies of higher-priced gas from unregulated foreign suppliers, a development which concerned the members of Congress.<sup>2</sup> Domestic suppliers, meanwhile, had little incentive to develop additional supplies for the interstate market. *Mid-Louisiana*, 463 U.S. at 330-31; *Transcontinental*, 474 U.S. at 420-21; Note, 59 Tex. L. Rev. at 112. Clearly, "a new system of natural gas pricing was needed to balance supply and demand." *Transcontinental*, 474 U.S. at 421.

The two Houses of Congress disagreed on the proper approach. On one side, the House of Representatives had passed a bill extending federal price ceilings to all sales, interstate and intrastate, at levels high enough to provide increased incentives for production. H.R. 8444, 95th Cong., 1st Sess. (1977). The stated purpose of this bill was "to bring the natural gas market into better balance by reducing the demand for natural gas and increasing the supply through the establishment of a uniform and incentive-based pricing system for new natural gas which provides fair and equitable producer revenues and protects consumers." H.R. 8444, § 401(b)(1), 95th Cong., 1st Sess. (1977).

On the other side, "[t]he Senate-passed bill embodied a significantly different approach to the natural gas

<sup>2</sup> See, e.g., 124 Cong. Rec. 28,891 (1978) (Sen. Randolph) ("We need assurances of a stable rate of production and supply. This will not be accomplished by relying on high prices from [sic] liquid natural gas from such countries as Algeria, Mexico and Indonesia.").

pricing policy issue than that adopted by the House."<sup>3</sup> Although the "goals of nearly every Member of the Senate [were] the same—an assured supply of natural gas, an attempt to reduce our national dependence on foreign oil and an ultimate concern for the energy health of this country," the "suggested routes for achieving those goals [were] apparently as numerous and as divergent as the membership of this body." 124 Cong. Rec. 31,838-39 (1978) (Sen. Hatfield). The final Senate bill would have left intrastate sales unregulated and deregulated most new gas in two years. S. 2104, 95th Cong., 1st Sess., 123 Cong. Rec. 32,306 (1977).

Faced with "a close vote in the Senate to deregulate and a close vote in the House to regulate," the Conference Committee "did the most sensible thing that one could do under all the circumstances." 124 Cong. Rec. 28,634-35 (1978) (Sen. Jackson). The Committee reconciled "these two very different bills" and reached a "compromise that Democrats and Republicans, consumers and producers, could stand behind." Conf. Rep. at 68; 124 Cong. Rec. 31,844 (1978) (Sen. Byrd). In the end, the result was "a bill which does not give any of the players everything he would like"; "[i]f you are a total regulator or if you are a total deregulator, this bill will not please you." 124 Cong. Rec. 31,842-43 (1978) (Sen. Muskie); 124 Cong. Rec. 28,882 (1978) (Sen. Bumpers).

Under the NGPA, Congress gave FERC "a fundamentally different regulatory obligation, a narrower authority" to administer pricing than either FERC or the FPC had under the Natural Gas Act. *Pennzoil Co. v. FERC*, 645 F.2d 360, 379 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). While the NGA authorized those agencies to set prices under a broad, discretionary "just and reasonable" standard, the NGPA charged FERC only with

<sup>3</sup> H.R. Conf. Rep. No. 1752, 95th Cong., 2d Sess. 68, reprinted in 1978 U.S. Code Cong. & Admin. News 8983, 8984 [hereinafter "Conf. Rep."].

administering a national "incentive pricing scheme" under express guidelines from Congress. 15 U.S.C. §§ 3312-19; *Mid-Louisiana*, 463 U.S. at 322, 333; *Amoco Production Co. v. Western Slope Gas Co.*, 754 F.2d 303, 305 (10th Cir. 1985).

At the outset, Title I of the NGPA established "an exhaustive categorization of natural gas production." *Mid-Louisiana*, 463 U.S. at 332-33. Eight categories are described in sections 102 through 109 of the statute. 15 U.S.C. §§ 3312-19. Because these categories were "designed to be exhaustive," "all natural gas production falls within at least one of the categories." 463 U.S. at 333.

The statute then "explicitly establishes an incentive pricing scheme that is wholly divorced from the traditional historical-cost methods" that the FPC had applied in implementing the NGA. *Id.* For each NGPA category, Congress either set a maximum lawful price or provided FERC with express guidelines for the calculation of such a price. 15 U.S.C. §§ 3312, 3319; *Mid-Louisiana*, 463 U.S. at 332. These price ceilings varied widely between the categories, reflecting Congress' desire to "provide investors with adequate incentives to develop new sources of supply" while maintaining a consumer price protection approach on old, existing sources of supply. *Mid-Louisiana*, 463 U.S. at 334; Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101 (1980).

Certain NGPA price ceilings ran counter to the interests of producers. Section 105, for example, "expanded federal control, since it granted FERC jurisdiction over the intrastate market for the first time." *Transcontinental*, 474 U.S. at 421; *Oklahoma v. FERC*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). Although the elected representatives of the producing states had attacked this section as extending "price controls and regulation to the only free market we have,

the intrastate market," Congress enacted the section and established a specific pricing formula for intrastate gas. 124 Cong. Rec. 28,589 (1978) (Sen. Hansen); 15 U.S.C. § 3315. At the same time, Congress also established a relatively low ceiling price for "old" interstate gas under section 104, reasoning that "previously dedicated gas needs no incentive since, by definition, it is economically producible under old prices." 15 U.S.C. § 3314; Note, 59 Tex. L. Rev. at 119.

In other NGPA sections, however, Congress favored the producers with incentive pricing on the belief that "[w]hether or not the old NGA rates were in fact sufficient to stimulate some production from those categories, . . . the Nation's energy needs justified the higher, statutory rate." *Mid-Louisiana*, 463 U.S. at 335-36. These sections created production incentives by concentrating the "rewards of higher prices where they are most needed—on the development of new, high-cost gas." 124 Cong. Rec. 28,633 (1978) (Sen. Jackson); Note, 59 Tex. L. Rev. at 119. Accordingly, Congress reserved its highest incentive prices for "new gas" under sections 102 and 103, "high-cost gas" under section 107, and "stripper well gas" under section 108. 15 U.S.C. §§ 3312, 3313, 3317, 3318.

Two of these incentive categories are principally relevant to this case: "stripper well" gas under section 108, and high-cost "tight formation gas" under section 107 (c) (5). 15 U.S.C. §§ 3317(c) (5), 3318. "Section 108's purpose is to provide a special price for wells with low production volumes because, absent an incentive price, the revenues therefrom may not cover the out-of-pocket operating costs of maintaining production." *Eccc, Inc. v. FERC*, 645 F.2d 339, 355 (5th Cir. 1981). Section 107 (c) (5) was designed to encourage production from conditions that FERC determined to present "extraordinary risks or costs," such as "tight formations with little permeability, including Western tight sand formations."

Conf. Rep. at 87; 15 U.S.C. § 3317(c)(5). Under this section, Congress intended for FERC to designate such conditions "in advance of drilling activity, in order to create price incentives." Conf. Rep. at 88. Congress further emphasized that the special incentive prices under section 107 "are not intended . . . to be cost-based in nature, and do not require cost justification." *Id.* Instead, those prices would reward the producer for "extraordinary risks" inherent in the drilling activity. *Id.*

Having defined a total of eight incentive and non-incentive pricing categories, Congress then provided for the phased-in price-deregulation of *certain* of these categories during the years 1979-87. Section 121 of the NGPA sets forth this system of phased-in, partial deregulation. 15 U.S.C. § 3331.<sup>4</sup> In drafting this section, the Conference Committee carefully noted that it "does not provide for deregulation of any natural gas production not specifically enumerated in this section." Conf. Rep. at 92. Categories that are not mentioned, including "old" gas under section 104, high-cost tight formation gas under section 107(c)(5), and stripper well gas under section 108, are never price deregulated. 15 U.S.C. § 3331; Conf. Rep. at 92; *Mid-Louisiana*, 463 U.S. at 336 n.14.

Against this background of complex, overlapping categories and prices, Congress established several "rules of general application to be used in interpreting this Act." Conf. Rep. at 74; 15 U.S.C. § 3311(b). One such rule of construction defines the relationship between the maxi-

<sup>4</sup> In section 121, Congress provided that deep wells, geopressured brine wells, coal seam wells and Devonian shale wells would deregulate and become exempt from any price ceiling on an effective date of November 9, 1979. 15 U.S.C. §§ 3317(c)(1)-(4), 3331(b). New wells under section 102, certain new onshore production wells under section 103, and certain intrastate wells under sections 105 and 106, would deregulate and become exempt from any price ceiling on January 1, 1985. 15 U.S.C. § 3331(a). Certain other new onshore production wells would deregulate and become exempt from any price ceiling on July 1, 1987. 15 U.S.C. § 3331(c).

mum lawful prices (or exemptions therefrom) established in the NGPA and the contract prices specified in gas purchase agreements between buyers and sellers. 15 U.S.C. § 3311(b)(9).<sup>5</sup> In section 101(b)(9), Congress confirmed that the NGPA does not entitle the seller to any particular gas price. Congress contemplated that private contracts, not the NGPA, would govern the relationships of buyers and sellers, and "section 101(b)(9) is Congress' express and specific intent not to preempt the ability of private persons to contractually govern their relationship." *Pennzoil Co. v. FERC*, 645 F.2d at 375. For any "first sale" of natural gas, the sale price is equal to the contract price so long as that contract price "does not exceed" the applicable category's ceiling price. 15 U.S.C. § 3311(b)(9). FERC has no authority to "nullify" a lawful first sale contract price. *Id.*

One other "rule of general application" is the very heart of this case. In section 101(b)(5), Congress provided a rule for the inevitable occasions when a single well qualified in more than one price-regulated (or deregulated) category:

**Sales qualifying under more than one provision.** If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a

<sup>5</sup> Section 101(b)(9) provides:

**Effect on contract price.** In the case of (A) any price which is established under any contract for the first sale of natural gas and which does not exceed the applicable maximum lawful price under this subchapter, or (B) any price which is established under any contract for the first sale of natural gas which is exempted under part B of this subchapter from the application of a maximum lawful price under this subchapter, such maximum lawful price, or such exemption from such a maximum lawful price, shall not supercede or nullify the effectiveness of the price established under such contract.

15 U.S.C. § 3311(b)(9).

price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b) (5).

Gas qualifying under more than one category has been termed "dual category" or "dually-qualified" natural gas. Pet. App. 73a-75a. For example, certain stripper wells that qualified for incentive pricing under section 108 by virtue of their low output might also qualify as "old" wells under section 104, "new" natural gas wells under section 102, or Devonian shale wells under section 107 (c) (4). Pet. App. 73-75a. Certain "tight formation" wells that have qualified for incentive pricing under NGPA section 107(c) (5) could also qualify as "new" wells under section 102 or 103.

In each of these cases, section 101(b) (5) expressly assures the producer that "the provision which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b) (5). "[T]he provisions that permit the seller to obtain the highest price applies." Conf. Rep. at 74. In a compromise statute filled with provisions both beneficial and detrimental to the producer, section 101(b) (5) stands out as a key provision which favors the interests of the producer.

#### B. Natural Gas Category Determinations.

As a threshold matter, the operation of the NGPA incentive pricing scheme depends upon the determination of the appropriate category or categories for each individual well. Although Congress created a "comprehensive" and "exhaustive" set of eight natural gas categories, it did not presume to determine the proper categories for thousands of wells located throughout the United States. Nor did Congress want FERC to do so. Instead, Congress gave this authority to state and federal agencies "having regulatory jurisdiction with re-

spect to the production of natural gas." 15 U.S.C. § 3413(c).<sup>6</sup> The determinations would be made upon application from the producer, subject to FERC review, but "there is no intention to allow the Commission to 'second guess' the agency by independently weighing the evidence and reversing the agency's determination as if the initial responsibility to make the determination were placed within the Commission." Conf. Rep. at 118.

Under this system, the producer must consider the terms of his contract, the terms of the NGPA, and the characteristics of his well before initiating his application. "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. 38,364 (1978) (Explanation Statement prepared by Reps. Dingell, Staggers, Ashley, Eckhardt and Wilson). And, "[i]f a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503." Conf. Rep. at 74.

#### C. Order Nos. 406 and 406-A.

Against this statutory background, FERC issued a Notice of Proposed Rulemaking in Docket No. RM84-14-000 on September 13, 1984, describing proposed rules designed to implement NGPA section 121(a) and facilitate the next phase of deregulation, which was then scheduled for January 1, 1985. Pet. App. 34a-60a. Among other things, FERC proposed that individual well category determinations under section 503 would continue after January 1, 1985 for all categories, including those that were slated for deregulation on that date. Pet. App. 38a.

<sup>6</sup> With regard to federal lands, this jurisdiction rests with the Bureau of Land Management of the United States Department of the Interior. See *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777, 781 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 748 (1988).

Relatedly, FERC proposed that producers who had qualified wells as "new tight formation gas" under section 107(c)(5) prior to January 1, 1985 had necessarily filed "the same information, in addition to other information" as was required to qualify under sections 102 and 103. Pet. App. 41a. FERC therefore proposed to "implicitly" determine that any well qualified as "new tight formation gas" under section 107(c)(5) also qualified in one or both of those price-deregulated categories. Pet. App. 41a-42a.

Finally, FERC proposed that based on the "overall scheme" of the NGPA, it "believe[d] that Congress intended all price controls for gas specified in section 121 to terminate on January 1, 1985, whether or not the gas continued to qualify for a regulated price." Pet. App. 43a-44a. While conceding that section 101(b)(5) "[a]rguably" provided that the gas would "remain regulated if the regulated price is higher than the deregulated price," FERC queried "whether Congress intended this section to supersede the explicit statutory requirement of deregulation in section 121." Pet. App. 44a.

On November 16, 1984, FERC issued its "final rule" in the form of Order 406. 18 C.F.R. § 270.208 (1987); Pet. App. 61a-103a. FERC focused much of its attention on the "significant deregulation issue" presented by dually-qualified natural gas. Pet. App. 74a. Claiming that section 101(b)(5) was "helpful, but not dispositive" on the issue, FERC turned instead to its own perception of "Congressional intent," the "overall scheme" of the NGPA, and the "mandatory" nature of deregulation under section 121. Pet. App. 75a-79a. Here FERC concluded that "[i]t is our belief that the statutory intent to deregulate takes precedence over the statute's increased supply objective." Pet. App. 77a. Based on this "belief," FERC reaffirmed its "position" that "[g]as that is dually-qualified must be considered deregulated under the NGPA." Pet. App. 75a. FERC then rejected producers' claims of reliance on the regulated incentive prices for

dually-qualified gas, finding that their reliance was "misplaced" because "[i]t should have been clearly understood that the incentive price was to be statutorily removed." Pet. App. 79a.

FERC then turned to the proper treatment of "new tight formation gas" under section 107(c)(5). Here again, FERC reaffirmed its view that such gas was "implicitly" qualified as section 102(c) or 103 gas because "[s]uch gas is obviously qualified for both categories . . . , regardless of whether that was explicit at the time that the determination was made." Pet. App. 82a. When coupled with FERC's earlier ruling on the "mandated" deregulation of dually-qualified gas, this ruling enabled FERC to insure that contract pricing provisions entitling the producer to regulated incentive prices for price-regulated gas would *not* apply to section 107(c)(5) wells, even though that category remained subject to price regulation. Pet. App. 81a-82a.

Eighteen parties, including the respondents in this case, sought rehearing of Order 406. Pet. App. 105a. FERC acted on those petitions in Order 406-A, issued December 21, 1984. Pet. App. 104a-126a. On the issue of dually-qualified gas, FERC maintained its "position" that "section 121 mandates deregulation," even though section 121 said nothing on the subject of dually-qualified gas and, indeed, did "not provide for deregulation of any natural gas production not specifically enumerated in this section." Conf. Rep. at 92. At the same time, however, FERC also proclaimed a new interpretation whereby section 101(b)(5) itself "compels" the deregulation of dually-qualified gas. Pet. App. 111a. FERC reasoned that since section 101(b)(5) directs that the NGPA category which "could result in the highest price" shall apply, it was proper to compare the theoretical "maximum" price under price-deregulation (an infinite sum) with the real maximum lawful price under existing regulation (a finite sum). *Id.* Under this "comparison,"

the price-deregulated category would *always* carry the higher price, so that the deregulated category would *always* apply to gas that was qualified in both regulated and deregulated categories. *Id.*

#### D. The Court of Appeals' Decision.

A unanimous panel of the United States Court of Appeals rejected this novel construction of the statute. Pet. App. 1a-24a. Acting on petitions for review filed by the respondents in this proceeding, the court of appeals held that section 101(b)(5) required application of the pricing category "which could result in the highest price" under the terms of the existing private sales contract for the gas. Pet. App. 16a-17a; 15 U.S.C. § 3311 (b)(5).

The court discerned that the NGPA pricing system was an "intricate balance of uniform price ceilings, incentive prices, and partial phased deregulation." Pet. App. 5a. In section 121, "[t]he deregulation proponents achieved a phased elimination of many, but not all" of the price ceilings. Pet. App. 7a. "[O]ld gas is not deregulated" and "of particular importance in this case, the NGPA does not include § 107(c)(5) tight formation gas or § 108 stripper well gas on the face of the deregulation provisions of § 121." Pet. App. 7a-8a.

FERC had interpreted section 121 to "mandate" deregulation of any gas determined to be "in one of the listed categories, . . . even if the gas has also been determined to be in a category that is not listed." Pet. App. 10a. The Conference Committee Report, however, had emphasized that section 121 "does *not* provide for deregulation of any natural gas production not specifically enumerated." Conf. Rep. at 92 (emphasis supplied). And this Court had held that section 121 provided for the "ultimate decontrol of a *number of categories* of natural gas." Pet. App. 11a (quoting *Mid-Louisiana*, 463 U.S. at 336 n.14) (emphasis in original). There-

fore, the court of appeals held that section 121 was ambiguous with respect to the treatment of gas qualified in both listed and unlisted categories. Pet. App. 11a.

In section 101(b)(5), however, Congress had "anticipated precisely this question." Pet. App. 11a. Recognizing that section 101(b)(5) applied to gas qualified in both regulated and deregulated pricing categories, the court held that this section addressed the very "question of which category shall apply when gas has been determined to qualify both for a regulated category and a deregulated category." Pet. App. 15a.<sup>7</sup> The category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311 (b)(5); Pet. App. 16a-17a.

Here, the court noted that FERC construed the section "to provide the same answer to this question in every case: the deregulated category will always apply." Pet. App. 15a. This construction, however, was based "on the obvious truth that the price of deregulated natural gas in an open market 'could' theoretically reach infinity." *Id.* According to FERC, the proper comparison was between this theoretical price and the very real ceiling price in existence at that time, rather than any similarly theoretical ceiling price. Pet. App. 15a-16a.<sup>8</sup>

<sup>7</sup> In the court of appeals, FERC had argued that although section 101(b)(5) referred to categories providing for an "exemption from such a price," this language did *not* refer to the deregulated categories. Pet. App. 14a-15a. The court of appeals rejected this argument, noting that FERC itself had used the term "exemption" to refer to deregulated categories. *Id.* Indeed, FERC had affirmatively stated that section 101(b)(5) applied to dually-qualified regulated-deregulated gas. See, e.g., Interim Rule Covering High-Cost Natural Gas Produced from Tight Formations, 45 Fed. Reg. 13,414, 13,422-23 (1980) ("Under section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible, including a deregulated price, if applicable."). FERC has expressly elected to "not renew" this argument to this Court. Pet. Br. 21 n.20.

<sup>8</sup> As the court of appeals recognized (Pet. App. 15a-16a), FERC has the authority to adjust certain ceiling prices at will. See 15

In rejecting this strained construction, the court held that the word "could" makes sense "only in the context of how gas sales actually occur." Pet. App. 16a. Congress understood that gas sales occur under the terms of private contracts, not under the terms of the NGPA. Pet. App. 16a-17a. Accordingly, the proper comparison was between the contract price for price-regulated gas in the regulated category and the contract price for price-deregulated gas in the deregulated category. *Id.* In the end, the NGPA provision that "could result in the highest price" under the contract would apply. *Id.*

In reaching this decision, the court also rejected FERC's view that the producers were seeking a "choice" or "election" between the price-regulated and price-deregulated categories. Pet. App. 18a. The court found that section 101(b)(5) "does not speak in terms of a choice or an election," but rather states that "whichever category could produce a higher price *shall* apply." *Id.* (emphasis in original). The producers have no "choice" in the treatment of dually-qualified gas. *Id.* The producers do, however, have a "choice as to which category or categories for which they seek to qualify particular gas." *Id.* And it was for this reason that FERC's views on the "implicit" qualification of all section 107(c)(5) "new tight formation gas" as "new gas" under sections 102 and 103 could not stand. Pet. App. 18a-19a. The court held that "[t]here is no support for such automatic determinations in the NGPA." Pet. App. 18a. Because there was no basis for the "assumption that gas can be determined to qualify for a particular category without going through the specific determination procedure set forth in § 503," FERC's conclusions on the treatment of new tight formation gas could not be upheld. Pet. App. 19a.

---

U.S.C. §§ 3314(b)(2), 3317(b). In theory, then, these ceilings "could" reach the same infinite values that FERC ascribes to the deregulated categories.

## SUMMARY OF ARGUMENT

The unanimous opinion of the court of appeals is correct. Section 101(b)(5) requires that natural gas which is dually-qualified in price-regulated and price-deregulated categories shall be treated in the category that "could result in the highest price" under the terms of the existing private sales contract for that gas.

A. The text of section 101(b)(5) is clear and unambiguous: for all "sales qualifying under more than one provision,"—including provisions "providing for any maximum lawful price" or for "any exemption from such a price"—the provision "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5). This rule means what it says. When gas is qualified in two NGPA categories, each with a different "sale" price under the terms of the prevailing contract, the category which could result in the "highest price" shall apply.

Congress chose these words for a reason. At the time of enactment, Congress understood that gas would be priced and sold under the terms of private contracts, most of which would set different prices for different categories of gas, including price-regulated and price-deregulated categories. Therefore, a rule was needed for those cases where a given well qualified in two or more categories. The issue was which category would apply for purposes of the contract pricing provisions, so as to permit *those provisions* to determine the proper sale price. Clearly, the NGPA itself would not require or "result" in the payment of *any* particular price for dually-qualified (or singly-qualified) gas.

With this in mind, Congress enacted a provision stating that whenever a particular well qualified in both a price-regulated and a price-deregulated category, the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5). Congress would not have enacted this provision if it wanted to establish

a simple rule requiring that all dually-qualified gas be treated as price-deregulated gas. Clearly, Congress did not envision any such automatic rule. What Congress wanted was a comparison of the prices "which could result," *i.e.*, a comparison of the actual sale prices payable under the terms of the sales contract covering the well in question.

Seeking to escape the text of the statute, FERC now admits that the statute requires a price comparison. Pet. Br. 22-23. But FERC contends that since the NGPA is not "concerned" with private contract prices, the proper "comparison" is between the existing statutory incentive price and the theoretically infinite exempt price potentially available at some indefinite future time. Because this speculative infinite price is always "higher" than any finite price, the exempt category always applies. In short, FERC believes that Congress chose to say that "the higher of A or B applies" when it knew all along that B was *always* higher and when it could have said "B always applies." This theory defies common sense.<sup>9</sup>

B. The legislative history of the NGPA solidly supports the construction adopted by the court of appeals. Not only does that history reveal no "clearly expressed legislative intention" contrary to the language of the statute, it actually contains two authoritative statements supporting its natural meaning. Moreover, section 101(b)(5) is fully consistent with the "broad purpose" of the NGPA. As this Court has recognized, the "broad purpose" of the NGPA was to assure adequate

<sup>9</sup> FERC is obviously correct in noting that the NGPA "leaves the establishment of actual sale prices to private decision." Pet. Br. 19. That is just the point. Because sale prices are privately established, a comparison of the sale prices for price-regulated and price-deregulated gas will yield different results in different cases. The purpose of the comparison is to determine the higher of those two prices in a particular case. In contrast, FERC proposes a purposeless "comparison" that always yields the same result.

supplies of natural gas at fair prices. It was *not* to achieve price-deregulation in the abstract. Phased-in, partial deregulation was simply one *means* of fulfilling the "broad purpose" of adequate supplies at fair prices. Incentive pricing for difficult-to-produce gas was another. In this case, section 101(b)(5) simply operates to insure producers the incentive pricing they relied upon in their search for difficult-to-produce gas.

C. Because the intent of Congress is clear and unambiguous, the Court should not defer to a contrary interpretation of the agency. FERC has no power to correct perceived flaws in the statute it administers. If FERC believes that a new compromise is justified under today's economic conditions, FERC should raise the matter with Congress, not this Court. Elected representatives of the producing and consuming states could then debate not just section 101(b)(5), but other provisions of the statute as well.

D. In attempting to avoid the clear impact of section 101(b)(5), petitioners in No. 87-364 suggest that any reference to that section is "simply wrong" because section 121 unambiguously mandates the deregulation of dually-qualified gas. Br. 10-11. Even FERC does "not renew" this argument, and with good reason. Basic tenets of statutory construction establish that Congress enacted section 101(b)(5) to directly address the question of dually-qualified gas. In contrast, section 121 does not even mention dually-qualified gas and, indeed, is limited in application only to the "specifically enumerated" categories. The silence of section 121, combined with the plain language of section 101(b)(5), requires that this case turn on section 101(b)(5).

E. In determining whether a well is dually-qualified for purposes of section 101(b)(5), it is necessary to focus upon the well category determinations made by the state and federal jurisdictional agencies with authority

to make those determinations. FERC has no power to make well category determinations under section 503 of the NGPA. 15 U.S.C. § 3413. FERC's ruling, therefore, that all new tight formation wells under section 107(c) (5) of the NGPA are "automatically" and "implicitly" new wells under section 102 or 103 exceeds the bounds of its authority.

### ARGUMENT

There is no dispute that the NGPA reflected a carefully-crafted legislative compromise, designed "to assure adequate supplies of natural gas at fair prices." *Transcontinental*, 474 U.S. at 421. Nor is there any dispute that this single "broad purpose" can be seen in a wide range of provisions, some of which favor the consumer, some of which favor the producer, and some of which are more neutral in their application. Some categories of gas are kept forever regulated at low prices.<sup>10</sup> Other categories of gas are kept forever regulated at higher prices. 15 U.S.C. §§ 3317(c) (5), 3318. Still other categories of gas are price-regulated initially and then deregulated over time as part of a system of phased-in, partial deregulation. 15 U.S.C. § 3331.

As part of this overall legislative compromise, Congress enacted a provision to cover those situations where gas qualified in more than one pricing category, including price-regulated and price-deregulated categories. This provision is section 101(b) (5). 15 U.S.C. § 3311(b) (5). In a complex and highly technical statute, with provisions both favorable and unfavorable to the producer, this one provision clearly and unambiguously favors the interests of the producer.<sup>11</sup> It does not say that dual-category gas

<sup>10</sup> For example, some old gas remains regulated at "below-market" ceiling prices ranging between \$.50 and \$1.00 per MMBtu. 15 U.S.C. § 3314; 53 Fed. Reg. 3,019, 3,020 (1988) (publication of current maximum lawful prices).

<sup>11</sup> To the extent that FERC wishes to characterize this provision as a "producer-assistance policy" (Pet. Br. 19), it should char-

shall always be treated in the price-regulated category. It does not say that dual-category gas shall always be treated in the price-deregulated category. It says that the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b) (5).

FERC is now trying to construe this provision away. Relying on its own perception of the "overall scheme" of the NGPA, FERC argues for a construction that is at war with the words of the statute and devoid of support in the legislative history. This Court should reject FERC's construction and affirm the opinion of the United States Court of Appeals.

#### A. The Court of Appeals Correctly Concluded That When "Sales Qualify Under More Than One Provision," Section 101(b)(5) Requires That the Provision Which Could Result in the Highest Sale Price Shall Apply.

"The starting point in statutory interpretation is 'the language of the statute itself.'" *United States v. James*, 106 S. Ct. 3116, 3121 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

The words of section 101(b) (5) are as follows:

**Sales qualifying under more than one provision.** If any natural gas qualifies under more than one pro-

acterize other sections of the NGPA, such as section 104, as a "consumer-assistance policy." See *supra* note 10; see also A. Tussing & C. Barlow, *The Natural Gas Industry: Evolution, Structure & Economics* 114-16 (1984) (NGPA a "hodgepodge" of pro-consumer and pro-producer rules).

vision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b)(5).

FERC argues that this language means that whenever natural gas qualifies in both a price-regulated and a price-deregulated category, the deregulated category always applies. "The short answer," however, "is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). If Congress wanted to write section 101(b)(5) to deregulate all gas qualifying in both a regulated and a deregulated category, it surely would have done so. Congress easily could have written a single sentence which clearly and simply provided for the price-deregulation of all gas qualifying in both regulated and deregulated categories.<sup>12</sup> Congress did not do that.<sup>13</sup> Instead, Congress provided that the category "which could result in the highest

<sup>12</sup> FERC has suggested that the reason Congress did not provide that "all gas qualifying under any provision providing for an exemption from a maximum lawful price shall be considered exempt" was that Congress wanted to cover both the regulated-deregulated and the regulated-regulated cases in a "single sentence." Pet. Br. 24. In the unlikely event that this were true, Congress could have provided that "any gas qualifying under more than one provision providing a maximum lawful price shall be treated under the provision which sets the highest price, and any gas qualifying under any provision providing an exemption from such a price shall be considered exempt."

<sup>13</sup> Compare *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 521 (1982) ("After all, Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of § 901(a)."); *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 381 (1987) ("Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option.").

price shall be applicable." 15 U.S.C. § 3311(b)(5). Neither Congress nor any other competent draftsman would use this language if it wished to reach the same result—price-deregulation—in every case. Congress chose its words for a reason, and it is this Court's "duty 'to give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section, as the Government's interpretation requires." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Township of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). Surely, the Court cannot assume that Congress engaged in careless draftsmanship in a statute as carefully-crafted as the NGPA.<sup>14</sup>

Congress understood that natural gas is priced and sold under the terms of private contracts.<sup>15</sup> Congress further understood that NGPA provisions do not in fact or theory "result" in the payment of any price.<sup>16</sup> Those provisions can only "result" in prices to the extent that they are referenced or incorporated in the terms of pri-

<sup>14</sup> Compare *Griffin v. United States*, 537 F.2d 1130, 1136 (Temp. Emer. Ct. App.) ("[W]e should not be quick to assume accidental or careless language on the part of Congress where considerate purpose may be seen in the words it employed."), *cert. denied*, 429 U.S. 919 (1976).

<sup>15</sup> See *supra* pp. 8-9; see also Conf. Rep. at 120 ("the seller may collect . . . the appropriate maximum lawful price . . . if the contract so permits"); Conf. Rep. at 74 ("In no case may a seller receive a higher price than his contract permits."); 2A C. Sands, *Sutherland Statutory Construction* § 45.12 (4th rev. ed. 1984) (legislative language must be interpreted by courts on the assumption that the legislature was aware of relevant statutes and facts).

<sup>16</sup> FERC continues to recognize and emphasize this fact. See 53 Fed. Reg. 3,754, 3,756 (1988) ("The Commission notes that high-cost gas prices established pursuant to section 107(c)(5) of the NGPA represent a maximum lawful ceiling price. The Commission does not guarantee that producers can collect these prices. Nor does the Commission require customers to pay this ceiling price.").

vate contracts. Therefore, when Congress wrote a statute providing that the "provision which could result in the highest price shall be applicable," Congress understood what it was saying: when a well is dually-qualified in a price-regulated and a price-deregulated category, the category which could result in the highest sale price under the terms of the sales contract for that well will apply.<sup>17</sup>

"[G]iven the plain terms of the statute, 'it requires some ingenuity to create ambiguity.'" *United States v. James*, 106 S. Ct. at 3121 (quoting *Rothschild v. United States*, 179 U.S. 463, 465 (1900)). From the outset, FERC has demonstrated an unusual degree of ingenuity in this case. After twice attempting to avoid section 101(b)(5) altogether, FERC now concedes that that section controls the treatment of dually-qualified regulated-deregulated gas. Pet. Br. 21 n.20.<sup>18</sup> In abandoning its

<sup>17</sup> Throughout its brief, FERC attempts to create the impression that this reading of section 101(b)(5) will foment widespread regulatory chaos. See, e.g., Pet. Br. 28. This is simply not the case. Like countless other parties to commercial contracts, gas buyers and gas sellers will perform the necessary comparisons and make the necessary price adjustments under the terms of their private contracts. Pet. App. 16a n.11. FERC will have no involvement whatsoever.

<sup>18</sup> FERC has continually shifted and modified its position on section 101(b)(5). In its Notice of Proposed Rulemaking, FERC took the position that section 121 mandated the deregulation of all dually-qualified regulated-deregulated gas, and that section 101(b)(5) was only "[a]rguably" involved. Pet. App. 44a. After receiving comments on the issue, FERC modified its position to assert that section 101(b)(5) was "helpful, but not dispositive." Pet. App. 78a. Then, when the court of appeals issued an opinion finding that section 101(b)(5) was not only "helpful" but also "dispositive" and adverse to FERC's approach, FERC modified its position for a third time, so that it is now claiming that section 101(b)(5) is "dispositive" and unambiguously *supportive* of its approach. Pet. Br. 21-27. Nowhere in the original Notice of Proposed Rulemaking did FERC articulate this theory of unambiguous, dispositive support.

earlier arguments, however, FERC remains unwilling to abandon its preconceived result.

Looking at the terms of the statute, FERC now admits that the category "which could result in the highest price" shall apply. 15 U.S.C. § 3311(b)(5). But FERC attempts to sidestep the natural meaning of these words by arguing that they refer to "the range of legally permitted possibilities." Pet. Br. 24. Therefore, in determining the price that "could result" for price-deregulated gas, FERC suggests that the Court should focus on the infinite price that "could" become available in some hypothetical world of the future. Pet. Br. 24-25. In determining the price that "could result" for price-regulated gas, however, FERC suggests that the Court should focus not on some equally hypothetical incentive price of the future, but on the maximum lawful price of today. *Id.* Finally, FERC "compares" these two "prices" and finds that "the result of the required comparison is always the same for regulated-deregulated gas" (Pet. Br. 24-25), i.e., the infinite "price" is always highest and the deregulated category always applies.

The only problem is that Congress did not ask for this "comparison"; it did not provide that "the provision which sets the highest price shall be applicable." Instead, Congress provided for a comparison of the prices which "could result" under a provision providing "for any maximum lawful price" and a provision providing "for any exemption from such a price." 15 U.S.C. § 3311(b)(5). Congress clearly contemplated that there would be some actual defined price attached to each category, *including the deregulated category*.

That actual defined price is the contract sale price. Contract prices are *real* values requiring a *real* comparison, and it is this real comparison that Congress chose to require—not a hollow comparison between a finite and an infinite sum. "It cannot be presumed that the legislature would do a futile thing." 2A C. Sands, *Sutherland*

*Statutory Construction* §§ 45.12, 46.06 (4th rev. ed. 1984).

**B. Congress Intended for the Provision Which Could Result in the Highest Sale Price to Apply.**

This Court has "repeatedly recognized" that when "the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *United States v. James*, 106 S. Ct. at 3122 (citation omitted). Those circumstances require "something to make plain the intent of Congress that the letter of the statute is not to prevail." *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (citation omitted). "[W]e look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1213 n.12 (1987).

**1. The Legislative Statements on Section 101(b)(5) Show That Congress Intended To Treat Dually-Qualified Gas in the Category Which Could Result in the Highest Sale Price.**

In this case, the legislative history strongly supports the unambiguous text of section 101(b)(5). Nowhere does the history contain any statement of "clearly expressed legislative intention" contrary to the text of the provision; in fact, the history contains two authoritative statements supporting the "natural meaning" of that text. The first appears in the "Explanation Statement" prepared for the House of Representatives by the House conferees (Reps. Dingell, Staggers, Ashley, Eckhardt and Wilson). 124 Cong. Rec. 38,363-64 (1978). In discussing section 101(b)(5), the conferees emphasized that although that section determined the proper treatment of dually-qualified natural gas, it did

not impose upon either the FERC or any state agency an affirmative obligation to identify which

of several potential classifications should apply. It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him (in most cases that will be the designation which also yields the highest price).

124 Cong. Rec. 38,363-64 (1978).

Therefore, when a producer examines section 101(b)(5) and its relationship to the pricing categories in sections 102-109, he is not to consider ceiling prices (or exemptions therefrom) in the abstract. Rather, he is to determine the category of the "greatest benefit to him," which will presumably be the category which "yields the highest price." *Id.* (emphasis supplied). In making this determination, the producer must refer to the sales contract for the well in question; it is that contract, not the NGPA, which "yields" a sales price for this gas. The NGPA simply assures the producer that *when* a well is qualified in the category which "yields the highest price" to "him," that category "shall be applicable" under section 101(b)(5). *Id.*

Further support for this principle comes from the most determinative piece of legislative history pertaining to the NGPA, the joint House-Senate Conference Committee Report.<sup>19</sup> The Conference Report considered the question of dual-qualification in the context of its discussion on gas subject to existing intrastate contracts with a price in excess of \$1.00 per MMBtu. Conf. Rep. at 83. Section 121(a)(3) "deregulates" [that] category for ceiling price purposes." *Id.* Nonetheless, section 121(e) provides that any gas that is deregulated "solely by reason" of its qualification in that category and that is sold "at a price established under an indefinite price escalator

<sup>19</sup> See Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 115 (1980) ("This report, which detailed the selection and construction of each section of the bill, is the most authoritative evidence of Congress' intent. It is almost as much a part of the NGPA as the bill's text.").

clause" shall be subject to a limitation on the operation of those clauses found in section 105(b)(3), even though "the ceiling prices for such gas are removed pursuant to section 121(a)(3)." Conf. Rep. at 83; 15 U.S.C. § 3331(e).

In discussing these provisions, the Conference Committee directly addressed the question of gas that was dually-qualified as a stripper well *and* an existing intrastate well priced in excess of \$1.00 per MMBtu. Conf. Rep. at 83. Would that gas *always* be price-deregulated under section 121(a)(3)? Or could that gas still receive incentive pricing under section 108? The Conference Report squarely indicates that producers could *continue* to price and sell their gas as price-regulated gas under section 108, without any limitation on indefinite price escalators, notwithstanding the "deregulation" of the overlapping intrastate category:

[N]atural gas qualifying as gas produced from a natural gas stripper well would not be so limited, if such gas were sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract.

Conf. Rep. at 83 (emphasis supplied).

This Report states that dually-qualified gas *can* be priced and sold in the price-regulated category; section 101(b)(5) does *not* require the price-deregulation of such gas. Indeed, the Conference Committee could not have been clearer in its view that "natural gas qualifying as gas produced from a natural gas stripper well" which also qualifies "as an existing intrastate contract" can be "sold subject to the provisions of sec. 108, rather than taking deregulated treatment." *Id.*<sup>20</sup>

<sup>20</sup> In attempting to distinguish this statement, FERC suggests that it refers to "the overlap of two regulated categories (§ 108, 15 U.S.C. 3318, and § 105(b)(3), 15 U.S.C. 3315(b)(3))." Pet. Br. 38 n.32. This suggestion is mistaken. First, section 105(b)(3) is not a "category" at all, but a limitation on the operation of price

In contrast to these two clear statements, FERC relies on two other statements, one by an individual Senator, which make the obvious point that when gas is qualified in both price-regulated and price-deregulated categories, the deregulated category can become applicable under the proper circumstances. Pet. Br. 37 & n.31.<sup>21</sup> Dually-qualified gas *will* be treated in the price-deregulated category whenever that category "could result in the highest price." 15 U.S.C. § 3311(b)(5). At the time of the NGPA debate in 1978, some congressmen believed that sale prices for price-deregulated gas *would* exceed the sale prices for price-regulated gas by the year 1985. Pet. App. 22a; *see also* 124 Cong. Rec. 38,361 (1978) (Rep. Dingell); 124 Cong. Rec. 31,819 (1978) (Sen. Metzenbaum). Statements on how section 101(b)(5) would operate in those circumstances provide no guidance on its operation in other circumstances.

In sum, the legislative history supports the construction of the court of appeals. Despite an exhaustive re-

escalators in existing intrastate contracts. 15 U.S.C. § 3315(b)(3). Second, the "category" of natural gas covered by "existing intrastate contracts" priced in excess of \$1.00 per MMBtu *was* deregulated in section 121(a)(3). *See* Conf. Rep. at 92 ("the agreement 'deregulates' those categories for ceiling price purposes") (emphasis supplied); Conf. Rep. at 83 ("natural gas which is *deregulated* solely as a result of qualifying as an existing contract") (emphasis supplied). Third, the Conference Report expressly refers to the option of "taking deregulated treatment" on stripper well gas subject to an existing intrastate contract. Conf. Rep. at 83. If the situation really involved an "overlap of two regulated categories" (Pet. Br. 38 n.32), "taking deregulated treatment" would not be an option.

<sup>21</sup> The statement of Sen. Bartlett corrected a misunderstanding on whether stripper wells were price-deregulated under section 121. *See* 124 Cong. Rec. 31,387 (1978). The reference from the House "Explanation Statement" simply stated that dual-qualification "would *permit* the producer to obtain stripper well pricing under section 108 prior to January 1, 1985, and deregulation as new gas thereafter." 124 Cong. Rec. 38,364 (1978) (emphasis supplied).

view and discussion of that history, FERC cannot cite a single comment undercutting the court of appeals' construction. In the end, FERC can do no more than claim that "the statements in the legislative history that address the subject of gas that could qualify for two different kinds of treatment point in opposite directions." Pet. Br. 37. Such contradictory statements hardly provide the "clearly expressed legislative intention" necessary to overcome the clear meaning of the statute itself. *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1213 n.12.

**2. The "Broad Purposes" of the NGPA Support Congress' Decision To Treat Dually-Qualified Gas in the Category Which Could Result in the Highest Sale Price.**

Unable to locate any "clearly expressed legislative intention" contrary to the court of appeals' interpretation of section 101(b)(5), FERC invokes the "broad purposes" of the statute. Here, FERC asserts that the "broad purpose" of the statute was to achieve price deregulation and prevent payment of "above-market" prices. Pet. Br. 28-38. This argument is seriously misplaced. First, as this Court recognized in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986):

Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Therefore, even if the "broad purpose" of the NGPA were to deregulate all gas, that "broad purpose" could not override a specific provision to the contrary. *Dimension*, 474 U.S. at 374.

Above all, however, the "broad purpose" of the NGPA was *not* price-deregulation as an end in itself; rather, as this Court has discerned, the "broad purpose" was "to assure adequate supplies of natural gas at fair prices." *Transcontinental*, 474 U.S. at 421. Phased-in, partial deregulation was one *means* of accomplishing this purpose. Incentive pricing for difficult-to-produce gas was another.<sup>22</sup> Even FERC concedes that some of the original incentive categories remain price-regulated to this date, unquestionably permitting regulated incentive prices for single-category gas not qualifying for price-deregulated treatment. 15 U.S.C. §§ 3317(c)(5), 3318.<sup>23</sup>

As a second, closely-related "broad purpose," FERC suggests that Congress wanted to prevent sellers from collecting "above-market" prices for their gas. Pet. Br. 28-38. But the simple fact is that Congress left the matter of gas pricing to private contracts. With respect to regulated gas, the only restriction is that the contract price not exceed the applicable ceiling price; if the seller can succeed in contracting for a price above the "market" but below the ceiling, the NGPA will not interfere. Nor will the NGPA interfere with a contract which sets an "above-market" price for price-deregulated gas. In other words, the potential for "above-market" pricing

<sup>22</sup> Members of this Court have commented on the economic impact of these incentive prices for difficult-to-produce gas. See *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 436 (1986) (Rehnquist, J., dissenting) ("High-cost gas makes up only a tiny fraction of the aggregate supply of natural gas. See *Pierce*, 68 Va. L. Rev. at 88 n.98 (about 1%). Thus, any increased costs associated with it will tend to be a mere drop in the bucket.").

<sup>23</sup> FERC continues to publish these incentive prices in the Federal Register on a quarterly basis. See 53 Fed. Reg. 3,019 (1988).

will *always* exist under the NGPA; even FERC's construction will not eliminate that possibility.<sup>24</sup> Accordingly, FERC cannot rewrite the text of the statute based upon an alleged congressional "intent" to eliminate "above-market" prices.

In view of FERC's own, repeated warnings that the NGPA is not "concerned with the private contract prices at which particular gas is sold" (Pet. Br. 19, 26-27), it is surprising that FERC would even challenge the court of appeals' ruling on the theory that it could lead to "higher-than-market" prices. *See* Pet. Br. 21. Respondents agree with FERC that "Congress clearly sought to set only maximum prices and otherwise to leave the establishment of the prices producers would actually charge to private decision." Pet. Br. 26. Under the terms of the court of appeals' decision, gas buyers and gas sellers will continue to enter into private sales contracts setting different prices for different NGPA categories of gas. These prices may be less than, greater than, or equal to the "market price." Section 101(b)(5) simply provides when gas is qualified in two categories, the category which carries the highest sale price "shall" apply. 15 U.S.C. § 3311(b). This determines the applicable pricing category under the NGPA, but it does not fix or "establish" the price in any way. The actual sales price for all categories, including the highest-priced category, remain subject to "private decision." Pet. Br. 26. Nothing in sec-

<sup>24</sup> FERC seems to believe that deregulation will automatically result in the payment of "market prices" for natural gas. *See* Pet. Br. 19, 28-35 ("the deregulated (market) price"). This is incorrect. As the court of appeals recognized, natural gas is often sold under long-term contracts which generally "contain two clauses—one which sets the price if gas is regulated and one which is implemented if gas is deregulated." Pet. App. 16a n.11 (quoting 49 Fed. Reg. at 46,878). Although the clause pertaining to deregulated gas *may* refer to a "market price," it may also refer to a fixed price above or below the "market." *Id.* The NGPA does not require the payment of "market" prices for deregulated gas. *See* 15 U.S.C. § 3311(b)(9).

tion 101(b)(5) or the court of appeals' opinion automatically entitles the seller to a "higher-than-market" price.

FERC itself has emphasized this point as recently as this month. *See* Order No. 459-A, 53 Fed. Reg. 3,754, 3,756 (1988). In declining to reduce the regulated incentive price for high-cost gas under section 107(c)(5), FERC stated:

The Commission notes that high-cost gas prices established pursuant to section 107(c)(5) of the NGPA represent a maximum lawful ceiling price. The Commission does not guarantee that producers can collect these prices. Nor does the Commission require customers to pay this ceiling price. The Commission expects the parties to negotiate an appropriate price for the purchase and sale of high-cost gas in the market. The Commission expects that parties to a contract would renegotiate a "problem contract" if the contract term is no longer market-responsive. The Commission, therefore, expects that the current market will serve to limit incentive prices to competitive levels. Such competitive market forces should be given a chance to operate before any decision is made that regulatory measures are needed to limit incentive prices.

*Id.* Therefore, while FERC informs this Court that price-regulation leads to above-market pricing (Pet. Br. 31-35), FERC informs the public that that is not necessarily the case.<sup>25</sup>

<sup>25</sup> As FERC recognized, even single-category price-regulated gas may be sold at a price other than the incentive price. Indeed, producers of tight formation gas may desire to sell those gas supplies at prices *below* the regulated incentive prices. The Crude Oil Windfall Profits Tax Act of 1980 permits a producer to obtain tax credits for the production of fuel from non-conventional sources, including tight formations. 26 U.S.C. §§ 29(a), (c) & (e) (Supp. II 1984). However, to receive the tax credit, the gas must be price-regulated and the producer must elect not to receive an incentive price for such gas. 26 U.S.C. §§ 29(c)(2)(B), (e).

### 3. *Changes in Economic Conditions Do Not Provide FERC with a License To Rewrite the Statute.*

Since FERC cannot show how the court of appeals' holding violates *either* a "clearly expressed legislative intention" or a "broad purpose" of the NGPA, FERC asserts that Congress could not possibly have foreseen the future operation of section 101(b)(5). Pet. Br. 28-38. According to FERC, Congress in 1978 failed to foresee the potential for low market prices in 1985, and hence could not have anticipated that contract pricing provisions "could result" in a higher price for price-regulated than price-deregulated gas under the terms of section 101(b)(5). *Id.*

This argument is factually incorrect. The very purpose of *phased-in* price-deregulation was to wait until the producers had discovered sufficient supplies of "new" gas to hold the market prices down. *See, e.g.*, 124 Cong. Rec. 28,879 (1978) (Sen. Melcher) ("Under the terms of this, getting above \$2.00, which it will in 1979 for new gas, it could probably bring in a lot more gas than we could envision at this time. So we might reach the point of additional supply."); 124 Cong. Rec. 31,845 (1978) (Sen. Glenn) ("[T]his legislation keeps the lid on prices during that period until production increases sufficiently to a point where there is enough supply that competition will effectively hold prices down."). Congress clearly understood the possibilities and enacted section 101(b)(5) in full view of those possibilities.

Yet even if section 101(b)(5) did generate an unexpected result in today's economic climate, that would authorize neither FERC nor the Court to rewrite the statute: "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA v. Hill*, 437 U.S. at 185. "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to

achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985). Accordingly, a court may not "attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." *Id.* "If the [statute] falls short . . . that is a problem for Congress, and not the [agency] or the courts, to address." *Dimension*, 474 U.S. at 374.

In attempting to rewrite the statute, FERC is reasserting the positions condemned by this Court in *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). In that case, FERC had issued orders which effectively prevented the interstate pipelines from receiving incentive prices on gas produced from their own wells. *Id.* at 322-24. FERC defended these orders with many of the same arguments it advances here, contending that they were necessary to prevent unfairness to the consumer, to preclude an "unintended windfall" to the pipeline-producer, and to fulfill the "implicit" intentions of Congress. *Id.* at 339, 341. In rejecting these arguments, this Court recognized that the NGPA established a "comprehensive regulatory scheme," 463 U.S. at 339, and that "[g]iven such a comprehensive scheme, we conclude that Congress would have clearly identified, either in the statutory language or in the legislative history, any significant source of production that was intended to be excluded" from incentive pricing. *Id.* at 336. "Yet nowhere in the NGPA do we find any expression of a desire to exclude pipeline production." *Id.* at 337.

This same principle applies in this case. Given the "comprehensive regulatory scheme" of the NGPA, Congress clearly would have said if it wanted all dually-qualified regulated-deregulated gas to be treated in the price-deregulated category. Congress did not say that. Instead, Congress said that the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5).

**C. Because Congress Has Manifested Its Intent in Section 101(b)(5), the Court Should Not Defer to a Contrary Interpretation of the Agency.**

As a final point in its brief, FERC suggests that its construction of the statute, even if "less than crystal clear" (Pet. Br. 39), is nonetheless entitled to "deference" (Pet. Br. 39-40). This suggestion is misplaced. As this Court has recognized, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1221 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). This rule applies notwithstanding any tradition of "deference" to agency interpretations. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Dimension*, 474 U.S. at 368.

In this case, "traditional tools of statutory construction" clearly and unambiguously reveal that Congress intended for gas qualified in both price-regulated and price-deregulated categories to be treated in the category which results in the highest sale price. 15 U.S.C. § 3311 (b)(5). Accordingly, that must be "the end of the matter" for both the agency and the Court. If FERC believes that these clearly-expressed legislative intentions are inappropriate, it should revisit the issue with Congress. Gas consumers and gas producers could then debate not just section 101(b)(5), but the entire NGPA compromise. Elected representatives would then have the opportunity to remake the law. In sum, "[i]f that provision is to be changed, it should be by Congress and not by this Court." *United States v. James*, 106 S. Ct. at 3125.

**D. Section 121 Does Not Override or Nullify the Meaning of Section 101(b)(5).**

In attempting to avoid the clear impact of section 101(b)(5), petitioners in No. 87-364 argue that that section does not apply to dually-qualified regulated-deregulated gas. Br. 10-11. Instead, these petitioners contend that section 121 controls the situation, requiring price-deregulation for any gas qualified in one of the listed categories even if it also qualifies in a category that remains price-regulated. Br. 10-11. Petitioners assert that section 121 is "not ambiguous" in this regard. *Id.*

This argument is untenable. On its face, section 101(b)(5) expressly refers to "sales qualifying under more than one provision," including provisions providing for "any maximum lawful price" and provisions providing for "any exemption from such a price." 15 U.S.C. § 3311 (b)(5). Reference to other portions of the NGPA removes any doubt that the "provisions" providing for "any exemption from such a price" are the price-deregulation provisions of section 121. In section 101(b)(9), for example, Congress expressly stated that the provisions providing for an "exemption from such a maximum lawful price" are the provisions of "part B of this subchapter," i.e., those in section 121. 15 U.S.C. § 3311 (b)(9). "There is a presumption that the same words used twice in the same act have the same meaning." 2A C. Sands, *Sutherland Statutory Construction* § 46.06 (4th rev. ed. 1984). Accordingly, section 101(b)(5) expressly applies to gas qualified in both a price-regulated category under part A and a price-deregulated category under part B.

FERC, the only petitioner claiming the right to deference in this case, interprets section 101(b)(5) to apply to dually-qualified regulated-deregulated gas. *See, e.g.*, Interim Rule Covering High-Cost Gas Produced from Tight Formations, 45 Fed. Reg. 13,414, 13,422-23

(1980) ("Under section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible including a deregulated price, if applicable."). FERC does "not renew" any argument to the contrary at this time. Pet. Br. 21 n.20. Therefore, the petitioners in No. 87-364 are advancing an argument that has met rejection not only from the respondents, but from FERC and the court of appeals as well.

In contrast to the clear and express applicability of section 101(b)(5), section 121 is totally silent on the issue of dually-qualified gas. That section extends price deregulation only to the "specifically enumerated" categories. Conf. Rep. at 92. In providing for the price deregulation of "a number of categories," *Mid-Louisiana*, 463 U.S. at 336 n.14, section 121 says nothing about gas which is qualified both in those categories and in the price-regulated categories. In view of this silence, and in view of the direct applicability of section 101(b)(5), it is clear that section 121 does not "mandate" the deregulation of dually-qualified gas.

**E. The Court of Appeals Correctly Concluded That FERC Has No Authority To "Automatically" or "Implicitly" Qualify New Tight Formation Gas as New Gas Under Section 102(c) or 103.**

In addition to its attempt to deregulate all dually-qualified gas, FERC has also attempted to insure that the maximum volume of gas becomes dually-qualified in both a price-regulated and a price-deregulated category. Therefore, FERC has announced that any well qualified in a price-regulated category as "new tight formation gas" under section 107(c)(5) also "automatically" and "implicitly" qualifies in a second, price-deregulated category as "new natural gas" under section 102 or "new, onshore production" gas under section 103. Pet. App. 81a-82a, 114a-115a. This determination has significance

in conjunction with FERC's mandated price-deregulation of dually-qualified gas; if dually-qualified gas were not price-deregulated, then FERC would have a lesser interest in dual-qualification. Nonetheless, its "implicit" determination of a dual-qualification still could not stand.

Section 503 of the NGPA expressly states that "[a] Federal or State agency having regulatory jurisdiction with respect to the production of natural gas is authorized to make determinations referred to in subsection (a)," including determinations with respect to "new natural gas" under section 102, "new, onshore production wells" under section 103 and "high-cost natural gas" under section 107(c). 15 U.S.C. §§ 3312, 3313, 3317(c), 3413(c)(1). Only "[i]f such agency executes [a] waiver" can FERC "make the determinations which would otherwise be made by such Federal or State agency." 15 U.S.C. § 3413(c)(2)(A). "Unless the jurisdictional agency waives its role, in writing, it is to make the initial determination of whether specific gas satisfies the factual criteria for a particular category of incentive-priced gas." *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777, 780 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 748 (1988).

The legislative history of the NGPA is replete with evidence that section 503 means what it says: natural gas category determinations are made by state and federal jurisdictional agencies upon application from the producer. See, e.g., Conf. Rep. at 74, 118; 124 Cong. Rec. 38,363-64 (1978) (Explanation Statement); 124 Cong. Rec. 17,481 (1978) (Sen. Domenici). In the absence of a properly-executed waiver, FERC would have no authority to make such a determination *even if* the producer presented FERC with an application. Clearly, FERC has no authority to make those determinations in the absence of an application.

The Conference Report leaves no room for debate on this matter:

[T]here is no intention to allow the Commission to "second guess" the agency by independently weighing the evidence and reversing the agency's determination as if the initial responsibility to make the determination were placed within the Commission.

Conf. Rep. at 118.

"The Federal Government will *not* be allowed to establish a separate bureaucracy for making the determinations required by this law." 124 Cong. Rec. 17,481 (1978) (Sen. Domenici) (emphasis supplied). "If a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503." Conf. Rep. at 74.

Even *these* agencies have no authority to act without an application. Therefore, while "a producer may claim or apply for the highest price to which he is entitled," there is no "duty to compel a State or Federal agency to search through the various price classifications under the act and find the highest permissible price." 124 Cong. Rec. 29,109 (1978) (Sen. Jackson). "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. 38,363-64 (1978) (Explanation Statement).

FERC cannot seriously contend that it would have the authority to issue an unsolicited "determination" that a particular well qualified under section 102(c) or 103. Nor can FERC contend that it would have the authority to issue an unsolicited "determination" that a particular well qualified under section 107(c)(5). Nonetheless, FERC purports to have the authority under its "broad" rulemaking powers to issue unsolicited "determinations" that most new tight formation wells under section 107(c)(5) are also qualified under section 102 or 103. Pet. Br. 41.

FERC has tried this once before. In *Williston Basin*, FERC claimed that it had made "case-by-case 'tight formation' determinations not through the procedures of section 503 but rather through somewhat different procedures of its own devising, for which it claimed authority in its broad rulemaking powers under section 501 of the NGPA." 816 F.2d at 781 (footnotes omitted). The United States Court of Appeals for the District of Columbia Circuit rejected this approach, holding that "[t]he parties' contention that FERC may avoid the specific procedures of section 503 by relying instead on its general rulemaking authority under section 501 renders section 503 nothing more than a mere suggestion from Congress for FERC to take or not as it likes." *Williston Basin*, 816 F.2d at 782-83. "Congress clearly intended that these designations would be made through the procedural scheme it enacted for that specific purpose, and section 503 was that scheme." *Id.* at 783.

This Court should reach the same result. FERC does not have authority to make *any* unsolicited well category determinations, regardless of whether those determinations are "implicit," "automatic" or based upon earlier jurisdictional agency determinations. The NGPA does not provide for "implicit" or "automatic" determinations. Pet. Br. 18a-19a. Congress gave FERC considerable authority under the NGPA, including the authority to define the requirements of new tight formation gas, but Congress did not give FERC the authority to make well category determinations. Conf. Rep. at 118.<sup>26</sup> Con-

<sup>26</sup> Near the end of its brief, FERC defends its "implicit" well category determinations on the theory that they are "in all relevant respects identical" to a redefinition of new tight formation gas. Pet. Br. 42. But the fact that FERC may have been able to achieve the same result through lawful means does not excuse its choice of an unlawful means. Compare *Singer v. Wadman*, 745 F.2d 606, 609 (10th Cir. 1984) (unlawful to commit "a lawful act by unlawful means"), *cert. denied*, 470 U.S. 1028 (1985).

gress gave that authority to state and federal jurisdictional agencies. 15 U.S.C. § 3413.

This Court has long recognized that an agency cannot exceed the scope of authority delegated by Congress, whether by regulation or administrative interpretation.<sup>27</sup> And just as an agency cannot exceed its granted jurisdiction, an agency also cannot use the "power to issue regulations" to "extend a statute or modify its provisions." *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 610 (1930). Clearly, an agency cannot "bootstrap itself into an area in which it has no jurisdiction." *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Agency "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Dimension*, 474 U.S. at 374.

In this case, FERC has used its rulemaking powers to extend the bounds of its authority. FERC has "implicitly" and "automatically" made the well category determinations that Congress has entrusted to others. The court of appeals properly rejected this inappropriate exercise of rulemaking power.

<sup>27</sup> See, e.g., *Peters v. Hobby*, 349 U.S. 331, 345 (1955); *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); *International Ry. v. Davidson*, 257 U.S. 506, 514-15 (1922); *United States v. Wickersham*, 201 U.S. 390, 398 (1906); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

*Counsel for Respondents*  
*Martin Exploration*  
*Management Company and*  
*Colorado Energy Corporation*  
 [And on behalf of Additional  
 Respondents Listed on  
 Following Pages]

Dated: February 16, 1988

JEFFREY S. DAVIDSON  
 Counsel of Record  
 STEPHEN A. HERMAN, P.C.  
 JAMES D. SENDER  
 YOSEF J. RIEMER  
 KIRKLAND & ELLIS  
 655 Fifteenth Street, N.W.  
 Washington, D.C. 20005  
 (202) 879-5000

## AMOCO PRODUCTION COMPANY

WILLIAM T. BENHAM \*  
200 East Randolph Drive  
P.O. Box 5910-A  
Chicago, Illinois 60680  
(312) 876-7941

## BHP PETROLEUM COMPANY, INC.

WILLIAM S. MARTIN \*  
5051 Westheimer  
1300 Post Oak Tower  
Houston, Texas 77056  
(713) 780-5313

## CITIES SERVICE OIL &amp; GAS CORP.

MICHAEL L. PATE \*  
P.O. Box 300  
Tulsa, Oklahoma 74102  
(918) 561-4541

## GRACE PETROLEUM CORPORATION

CHARLES H. SHONEMAN \*  
BRACEWELL & PATTERSON  
2000 K St., N.W., Suite 500  
Washington, D.C. 20006-1809  
(202) 828-5800

## OHIO OIL AND GAS ASSOCIATION

M. HOWARD PETRICOFF \*  
W. JOHNATHAN AIREY  
VORYS, SATER, SEYMOUR  
AND PEACE  
52 East Gay St.  
Columbus, Ohio 43215  
(614) 464-5414

## PHILLIPS PETROLEUM COMPANY

JOHN L. WILLIFORD  
CHARLES L. PAIN \*  
1258 Adams Building  
Bartlesville, Oklahoma 74004  
(918) 661-6355

## ARCO OIL AND GAS COMPANY

HARRIS S. WOOD \*  
P.O. Box 2819  
Dallas, Texas 75221  
(214) 880-4869

## CHEVRON U.S.A., INC.

JAMES B. ATKIN \*  
DAVID J. EVANS  
PILLSBURY, MADISON & SUTRO  
1667 K St., N.W., Suite 1100  
Washington, D.C. 20006  
(202) 887-0300

## EXXON CORPORATION

C. ROGER HOFFMAN  
DOUGLAS W. RASCH \*  
P.O. Box 2180  
Houston, Texas 77001  
(713) 656-1691

INDEPENDENT OIL AND GAS  
ASSOCIATION OF WEST VIRGINIA

R. GORDON GOOCH \*  
TRAVIS AND GOOCH  
1101 15th St., N.W., Suite 1200  
P.O. Box 65688  
Washington, D.C. 20035-5688  
(202) 457-9100

## PLACID OIL COMPANY

RONALD D. HURST \*  
PAUL W. HICKS  
3900 Thanksgiving Tower  
Dallas, Texas 75201  
(214) 880-1000

## PENNZOIL COMPANY

JOHN B. CHAPMAN \*  
KATHELENE E. MAGRUDER  
Pennzoil Place  
700 Milam Street  
Houston, Texas 77002  
(713) 546-8859

JOHN McDONALD  
RICHARD E. POWERS, JR.  
BUTLER & BINION  
1747 Pennsylvania Ave., N.W.  
Washington, D.C. 20005  
(202) 466-6900

UNION OIL COMPANY OF  
CALIFORNIA

KENNETH L. RIEDMAN \*  
Room 907  
P.O. Box 7600  
Los Angeles, California 90051  
(213) 977-7768

## SHELL OFFSHORE, INC.

SHELL WESTERN E&P, INC.  
THOMAS G. JOHNSON \*  
One Shell Plaza  
Houston, Texas 77001  
(713) 241-4742

## UNION PACIFIC RESOURCES

CONSTANCE D. COLEMAN \*  
801 Cherry Street  
P.O. Box 7, MS 4010  
Ft. Worth, Texas 76101-0007  
(817) 877-7540

\* Counsel of Record

MAR 14 1988

JOSEPH F. SPANIOL, JR.  
CLERK

Nos. 87-363 and 87-364

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLOATION MANAGEMENT COMPANY, ET AL.

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL.,  
PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT***REPLY BRIEF FOR THE  
FEDERAL ENERGY REGULATORY COMMISSION**

DONALD B. AYER  
*Acting Solicitor General  
Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

CATHERINE C. COOK  
*General Counsel  
Federal Energy Regulatory Commission  
Washington, D.C. 20426*

## TABLE OF AUTHORITIES

	Page
<b>Cases:</b>	
<i>Pennzoil Co. v. FERC</i> , 671 F.2d 119 (5th Cir. 1982) .....	10
<i>Public Service Comm'n v. Mid-Louisiana Gas Co.</i> , 463 U.S. 319 (1983) .....	5
<i>Williston Basin Interstate Pipeline Co. v. FERC</i> , 816 F.2d 777 (D.C. Cir. 1987), cert. denied, No. 87-502 (Jan. 19, 1988) .....	9-10, 11
<b>Statutes and regulation:</b>	
Natural Gas Policy Act of 1978, 15 U.S.C. 3301 <i>et seq.</i> :	
§ 101(b)(5), 15 U.S.C. 3311(b)(5) .....	1, 2, 3, 4, 5, 6, 8
§ 102, 15 U.S.C. 3312 .....	7, 10
§ 102(c), 15 U.S.C. 3312(c) .....	10
§ 103, 15 U.S.C. 3313 .....	7, 10
§ 105(b)(3), 15 U.S.C. 3315(b)(3) .....	7, 9
§ 105(b)(3)(A), 15 U.S.C. 3315(b)(3)(A) .....	7, 9
§ 105(b)(3)(B), 15 U.S.C. 3315(b)(3)(B) .....	7
§ 105(b)(3)(D), 15 U.S.C. 3315(b)(3)(D) .....	7, 9
§ 107(c)(1)-(4), 15 U.S.C. 3317(c)(1)-(4) .....	7
§ 107(c)(5), 15 U.S.C. 3317(c)(5) .....	7, 10
§ 108, 15 U.S.C. 3318 .....	7, 8, 9
§ 121, 15 U.S.C. 3331 .....	7, 9
§ 121(a)(3), 15 U.S.C. 3331(a)(3) .....	7, 8, 9
§ 121(e), 15 U.S.C. 3331(e) .....	7, 9
§ 122, 15 U.S.C. 3332 .....	4
§ 501, 15 U.S.C. 3411 .....	10
§ 503, 15 U.S.C. 3413 .....	6
§ 503(a)(2), 15 U.S.C. 3413(a)(2) .....	10
18 C.F.R. 271.703(b) .....	10
<b>Miscellaneous:</b>	
124 Cong. Rec. (1978):	
p. 28633 .....	5
pp. 38363-38364 .....	6
H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. (1978) ...	6, 8

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

---

No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

---

No. 87-364

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL.,  
PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

**REPLY BRIEF FOR THE  
FEDERAL ENERGY REGULATORY COMMISSION**

---

In our opening brief, we argued that the Commission correctly construed NGPA Section 101(b)(5), 15 U.S.C. 3311(b)(5), to provide that, when gas is qualified under more than one NGPA pricing provision, the applicable provision is the one that establishes the highest ceiling price—so that, in particular, if one provision declares that there is no legal ceiling, that provision applies and the gas is price-deregulated. We showed that this construction is required by the language of Section 101(b)(5) and by the NGPA's general approach to price regulation, both of

which focus on legal ceilings and not on particular producers' contract prices, and is the only construction consistent with the overall congressional plan of phased-in deregulation and with the terms of the debate that led to enactment of the NGPA. We also showed that the court of appeals' and the producer respondents' contrary construction, which grants each producer of dual-qualified gas the right to avail itself at any particular time of whichever provision results in the highest price under its particular contracts, is incompatible with the statutory text, structure, and history. Nothing in the producer respondents' brief, which ignores large parts of our analysis, casts any doubt on the correctness of the Commission's conclusion, and only a few of respondents' arguments warrant a reply.<sup>1</sup>

1. Respondents attempt a plain-language argument (Br. 21-26), but instead of carefully examining the words of Section 101(b)(5), they offer only general rules of statutory construction and repetition of the statutory text. The section states that, when a quantity of gas qualifies under more than one provision, "the provision which could result in the highest price shall be applicable." Respondents make no plausible effort to account for the fact that Section 101(b)(5) selects the provision that "could result" in the highest price, an expression that on its face refers to a legal ceiling, not the provision that "results" or "actually results" or "will result" in the highest price under a particular contract at a particular time. Respondents ignore the fact (see Gov't Br. 23-24) that nothing in the language makes any reference to particular producers or their contracts or suggests that two producers whose gas

<sup>1</sup> We hereafter refer simply to "respondents" in speaking of the producer respondents, Martin Exploration Management Co., et al.

falls within the same overlap of pricing provisions could receive different treatment for that gas depending on what prices each agreed to in its contracts. And respondents make no attempt to show how a reading of Section 101(b)(5) under which the applicable ceiling is determined by first examining particular contract prices would accord with the overall approach taken by the NGPA's wellhead pricing provisions, which focus on ceiling prices only and otherwise leave contract prices wholly to private decision (see Gov't Br. 25-27).

Respondents make, at bottom, only two arguments on the statutory language. First, they appear to suggest (Br. 23) that the reason Congress used "could result" rather than "results" or "actually results" or "will result" is that, since NGPA provisions do not *dictate* prices, it would be improper usage to employ one of those alternative locutions. But respondents' own brief in opposition, at the petition stage in this case, repeatedly used those very locutions (Br. in Opp. 8, 11, 14, 16) when *they* wanted to convey the idea of comparing provisions to see which leads to the highest price at a particular time under particular contracts. Congress could have done the same thing, but it chose the words "could result" because it wanted a comparison of NGPA provisions, not of the prices called for by particular contracts.

Respondents also argue that Congress would not have chosen the language it did "if it wished to reach the same result—price-deregulation—in every case" (Br. 23). But respondents mysteriously ignore the fact that Section 101(b)(5) also governs the choice between two or more *regulated* categories in which a particular quantity of gas qualifies. See Gov't Br. 23-25. The language Congress used in Section 101(b)(5) is an economical and altogether natural way to cover all category comparisons in a single

sentence; indeed, it is not easy to think of a more compact (or clearer) way to accomplish the task.<sup>2</sup>

2. a. Respondents' analysis of congressional intent (Br. 26-33) makes no attempt to respond to our showing (Gov't Br. 28-31) that their proposed construction of Section 101(b)(5), which would allow a producer to opt back into regulation whenever it could obtain a regulated price higher than the price it would obtain if the gas were deregulated, is incompatible with the compromise plan for the future of natural gas pricing that Congress put into effect in the NGPA. As the statute's structure and legislative history make clear, the NGPA creates a scheme of "phased deregulation," and there is no indication that Congress contemplated a return of deregulated gas to regulated status except through the carefully limited mechanism of Section 122, 15 U.S.C. 3332 (now-expired authority for one-time, temporary presidential or congressional reimposition of price controls). Respondents do not merely ignore that plan in construing Section 101(b)(5). They suggest (Resp. Br. 6-9, 20-21 & n.11) that the NGPA's provisions may be neatly divided into those which are pro-producer and those which are pro-consumer, and that

<sup>2</sup> Respondents suggest (Br. 22 n.12) a rewriting of Section 101(b)(5) that they believe reflects the Commission's reading of the provision, but that rewriting betrays respondents' misunderstanding both of Section 101(b)(5) and of the Commission's reading. Under respondents' rewriting, regulated-regulated gas would "be treated under the provision which sets the highest price" (Resp. Br. 22 n.12). But the pricing provisions of the NGPA do not "set[]" prices; they establish only upper limits, if any, on the prices that producers and their customers may set by contract. Accordingly, a "competent draftsman" (*id.* at 23) who wished, as we think Congress did, to provide for a comparison of "maximum lawful prices" would not make applicable "the provision which sets the highest price" (*id.* at 22 n.12). Such a draftsman, we think, would make applicable the provision that "could result in the highest price."

Section 101(b)(5) must be read as clearly in the former group, thus allowing its construction in isolation from the structure and aims of the NGPA as a whole.

Respondents also offer no answer at all to our argument (Gov't Br. 31-35) that their construction of Section 101(b)(5) would treat producers in a manner wholly outside the terms of the debate that led to the NGPA's enactment and far more favorably than anyone in Congress contemplated. The NGPA reflects the "Conference Committee's careful reconciliation of two strong, but divergent, responses to the natural gas shortage" (*Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983)), one favoring rapid deregulation, the other the extension of regulatory controls into intrastate markets. It would be inconsistent with both of those responses to give producers a legal tool for securing higher prices for gas eligible for deregulation than they could obtain in the unregulated market. As Senator Jackson, the Senate floor manager, made clear (124 Cong. Rec. 28633 (1978)), deregulation was the "maximum economic incentive" that anyone in Congress contemplated.<sup>3</sup>

b. Ignoring the import of the statutory structure and of the legislative history taken as a whole, respondents focus (Br. 26-28) on two particular statements in the leg-

<sup>3</sup> Contrary to respondents' misinterpretation (Br. 30-33), we do not suggest that there is some single "market price" applicable to all producers, above which the NGPA forbids producers to sell. A "market price," of course, is the price a particular producer can obtain in the market from a particular purchaser at a particular moment, and there could conceivably be as many market prices as there are producer-purchaser transactions. The point is that Congress did not intend to give producers a mechanism for obtaining a higher price than they could obtain in the market, once the dates set by the NGPA for deregulation arrived.

islative history. As we explained in our opening brief (at 36-38), however, even aside from the existence of statements in the legislative history that point in the opposite direction (see Pet. App. 21a n.15), the statements respondents rely on cannot possibly overcome the arguments supporting the Commission's construction of Section 101(b)(5).

The first statement—by key House conferees led by Representative Dingell (124 Cong. Rec. 38363-38364 (1978)), who was in what respondents would term the “pro-consumer” group of legislators (Resp. Br. 21 n.11)—was indeed offered in explanation of Section 101(b)(5). But, as we have explained (Gov't Br. 37-38), the statement was addressed to a different problem from that presented in these cases: the process by which producers qualify gas in particular categories, not (as here) the selection among multiple categories in which gas has already been qualified. The statement simply assured other legislators that the process of obtaining category-qualifications from state and federal jurisdictional agencies under Section 503, 15 U.S.C. 3413, which relies at least in general on producer initiative, would not be displaced by Section 101(b)(5)—that is, that Section 101(b)(5) did not mean that the jurisdictional agencies would have the substantial burden of determining *sua sponte* all of the provisions under which particular gas might be qualified.

The second statement relied on by respondents, which appears in the Conference Report (H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. 83 (1978)), was not made as an explanation of Section 101(b)(5) at all, so it could be of little weight in determining the proper construction of that provision. As we explained in our opening brief (at 38 n.32), the statement is an explanation of the singular and

complex pricing requirements of Sections 105(b)(3) and 121(e), 15 U.S.C. 3315(b)(3), 3331(e), covering certain gas sold under existing (or successor) intrastate contracts subject to “indefinite price escalator clauses.”<sup>4</sup> Properly understood, the conference committee statement does not offer respondents any support.

Gas sold under existing (or successor or rollover) intrastate contracts at a price in excess of \$1 (per million British thermal units) is generally deregulated by Section 121(a)(3), 15 U.S.C. 3331(a)(3), effective January 1, 1985. Section 121(e), however, calls off that price deregulation for a subcategory of such gas: if the price is established by an indefinite price escalator clause, and if the gas would not in any event be deregulated under a subsection of Section 121 other than subsection (a)(3), then Section 105(b)(3) applies. Subsection (A) of that provision, in turn, places a ceiling on price escalation for such gas, and subsection (D) then states that that ceiling does not apply to gas (as Section 121(e) already makes clear) that falls into other categories deregulated by Section 121 (gas under Sections 102, 103, 107(c)(1)-(4), 15 U.S.C. 3312, 3313, 3317(c)(1)-(4)) or to gas that falls into the still-regulated categories of high-cost and stripper-well gas defined by Sections 107(c)(5) and 108, 15 U.S.C. 3317(c)(5), 3318,

---

<sup>4</sup> An indefinite price escalator clause is defined in Section 105(b)(3)(B), 15 U.S.C. 3315(b)(3)(B), as any provision of any contract—

(i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil; or for refined petroleum products; or

(ii) which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

and that is therefore subject to other (in fact, higher) ceilings. In short, a portion of the intrastate gas that would be deregulated by Section 121(a)(3) is brought back under regulation to limit the effect of indefinite price escalator clauses.

The Conference Report (H.R. Conf. Rep. 95-1752, *supra*, at 83) explains the workings of those complex pricing provisions, stating:

[N]atural gas which is deregulated as a result of being new gas under sec. 121(a)(1), gas from deregulated new, onshore production wells under sec. 121(a)(2) or 121(c), or high cost natural gas under sec. 121(b), would not be subject to this limitation [Section 105(b)(3)], even if it were sold under an existing intrastate contract. Furthermore, natural gas qualifying as gas produced from a natural gas stripper well would not be so limited, if such gas were sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract.

Respondents seize on the last sentence of that explanation, concerning Section 108 gas, and, without reference to the context or the underlying statutory provisions it explains, claim that Congress here stated that dual-qualified regulated-deregulated gas could take regulated treatment at the producer's option (Resp. Br. 27-28). But even aside from whether Congress's understanding of Section 101(b)(5) can be inferred from this single statement, which is buried in a long explanation of complex, interrelated provisions other than Section 101(b)(5) itself, the statement does not indicate what respondents suggest.

First, the statement is not in fact addressed to gas that falls into two categories, one with a price cap, the other not. The statement concerns the overlap of gas covered by

Section 108 and gas covered by Section 105(b)(3)(A)—both of which are subject to statutory ceilings. The conference committee admittedly referred to gas taking “deregulated treatment,” but that usage cannot change the fact that the statement applies only to gas that falls under two provisions that impose price ceilings. Even respondents recognize the peculiarity of the committee's usage: they properly use quotation marks in their own reference to “the ‘deregulation’ of the overlapping intrastate category” (Br. 28). The committee's usage, which the Commission (Pet. App. 117a) and the court of appeals (*id.* at 25a) followed, is due to the complex structure of Section 121, under which the intrastate gas at issue is “deregulated” by Section 121(a)(3), only to be brought back under a price control in certain circumstances by Sections 121(e) and 105(b)(3).

Second, although the particular sentence relied on by respondents does not address gas qualified for both a category subject to price caps and a category that is not, the provisions that are explained in the cited portions of the Conference Report do. And what those provisions say confirms the Commission's view that regulated-deregulated gas should be treated as deregulated. In each case of the overlap of a category of gas subject to a price ceiling (*i.e.*, the Section 105(b)(3)(A) price ceiling) with a category in which all price ceilings are removed, Sections 105(b)(3)(D) and 121(e) specifically provide that the latter category governs.

3. On the second question presented in these cases, respondents argue (Br. 38-42) that the Commission has overstepped its authority and interfered with the process of qualifying gas in particular categories. But the Commission has not issued any determinations of the qualification of particular gas or provided for the bypassing of the Section 503 procedures. Compare *Williston Basin Inter-*

*state Pipeline Co. v. FERC*, 816 F.2d 777, 781-782 (D.C. Cir. 1987), cert. denied, No. 87-502 (Jan. 19, 1988). Rather, as we explained in our opening brief (at 40-43), the Commission has merely insisted by rule that jurisdictional agencies implement the concededly valid definition of a certain category of "new tight formation" gas under Section 107(c)(5) that it is unquestionably within the Commission's power to define: since such gas "is" Section 102 or 103 gas, by definition, it must be given that label when it is given the Section 107(c)(5) label.<sup>5</sup>

This was an entirely reasonable exercise of the Commission's regulatory powers under Sections 501 and 503(a)(2), 15 U.S.C. 3411, 3413(a)(2), and of the special power to develop the Section 107(c)(5) pricing scheme, which Congress expressly committed "to the expertise and judgment of FERC" (*Pennzoil Co. v. FERC*, 671 F.2d 119, 123 (5th Cir. 1982)). Indeed, in providing for deregulated treatment under Section 102 or 103 of certain new tight formation gas, the Commission has furthered Congress's intent to reserve Section 107(c)(5) incentive pricing for those situations where it is "needed in order to make high-cost

<sup>5</sup> Indeed, in order to be new natural gas ("as defined in section 102(c)"), and hence come within the definition of new tight formation gas under Section 107(c)(5) (see 18 C.F.R. 271.703(b)), the gas must, by virtue of Section 102(c) itself, be "determined in accordance with section 503" to meet Section 102(c)'s requirements. For such gas, the statute thus expressly states what the Commission here reaffirmed by rule: a new tight formation determination cannot be issued without issuance of the implicit Section 102(c) determination. Section 103 contains the same "determined in accordance with section 503" language, but it does not appear in the definitional subsection (c) referred to in the Commission's regulation defining new tight formation gas. So trivial a difference, however, cannot render the Commission's Section 107(c)(5) ruling valid for Section 102 gas and not valid for Section 103 gas.

gas worth exploiting" (*Williston Basin Interstate Pipeline Co.*, 816 F.2d at 779). In any event, the court of appeals on rehearing (Pet. App. 30a) recognized "FERC's continuing authority to modify the criteria that establish which types of gas qualify under § 107(c)(5)." What the Commission has done is no different from such a modification (Gov't Br. 42).

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. AYER\*  
Acting Solicitor General

CATHERINE C. COOK  
General Counsel  
Federal Energy Regulatory Commission

MARCH 1988

\* The Solicitor General is disqualified in these cases.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, *et al.*,

*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT  
COMPANY, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT

REPLY BRIEF

RAYMOND N. SHIBLEY  
BRIAN D. O'NEILL  
LeBoeuf, Lamb, Leiby &  
McRae  
1333 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

*Counsel for Panhandle  
Eastern Pipeline Company*

FREDERICK MORING  
HERBERT J. MARTIN  
Crowell & Moring  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2505

*Counsel for Associated Gas  
Distributors*

RICHARD A. SOLOMON  
MARK N. MUTTERPERL  
Wilner & Scheiner  
Suite 300  
1200 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

*Counsel for The Public Service  
Commission of the State of  
New York*

TERENCE J. COLLINS  
ROBERT BALLENTINE  
P. O. Box 2511  
Houston, Texas 77252-2511

*Counsel for Tennessee Gas  
Pipeline Company*

March 17, 1988

## TABLE OF AUTHORITIES

	Page
 <i>Cases:</i>	
<i>Mountain States Telephone and Telegraph Company v. Santa Ana</i> , 472 U.S. 237 (1985) .....	2
<i>Reiter v. Sonotone</i> , 442 U.S. 330 (1979) .....	3
 <i>Statute:</i>	
Natural Gas Policy Act of 1978, 15 U.S.C. 3301 <i>et seq.</i>	
§ 101(b)(5), 15 U.S.C. 3311(b)(5) .....	2, 3, 4
§ 121, 15 U.S.C. 3331 .....	1, 2, 4
 <i>Miscellaneous:</i>	
124 Cong. Rec. 38, 363 (1978) .....	4, 5

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

---

No. 87-364

---

PUBLIC SERVICE COMMISSION OF THE  
STATE OF NEW YORK, *et al.*,

*Petitioners.*

v.

MARTIN EXPLORATION MANAGEMENT  
COMPANY, *et al.*,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT

---

REPLY BRIEF

---

We showed in our opening brief that, under Section 121 of the Natural Gas Policy Act, 15 U.S.C. 3331, statutory ceiling prices "cease to apply" to first sales of various categories of natural gas on certain dates. We also showed that Section 121 is fully consistent with Section 101(b)(5) of the NGPA, upon which respondents rely, because Section 101(b)(5) states a rule of construction which, as relevant here, compels the use of deregulated prices for the categories of gas deregulated by Section 121. As we explained, the Federal Energy Regulatory Commission (FERC) permissibly determined that if natural gas qualifies for deregulation under Section 121 and for maximum statutory prices, the gas' deregulated status always "could result in the highest price" because there are no statutory limitations on the prices for deregulated gas.

1. Nothing in the respondents' brief militates against our showing. Above all, the respondents ignore the substance of Section 121 when they argue (Brief 24) that, under Section

101(b)(5), "when a well is dually-qualified in a price-regulated and a price-deregulated category, the category which could result in the highest sale price under the terms of the sales contract for that well will apply." As indicated both in our opening brief and that of the FERC, the language of Section 101(b)(5) provides for a comparison of the maximum lawful prices which could result from the applicability of either one of the regulated pricing categories or under deregulation, rather than a comparison of the provisions of sales contracts applicable under differing regulatory conditions.

In any event, to the extent that Section 101(b)(5) standing alone might conceivably be construed in the manner urged by respondents, such a construction must fail because it would result in applying maximum ceiling prices contrary to Section 121's dictates that such prices "cease to apply." Respondents' argument is thus untenable, violating "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Telephone and Telegraph Company v. Santa Ana*, 472 U.S. 237, 249 (1985) quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). Moreover, it is inconceivable that Congress would have provided expressly in Section 121 that statutory ceiling prices no longer apply to categories of gas and then provided by implication in Section 101(b)(5) that those prices would apply if they exceed deregulated prices under particular contracts.<sup>1</sup>

<sup>1</sup>Petitioners contend (Brief 37-38) that Section 101(b)(5) is applicable to gas qualifying both within the deregulation mandate of Section 121 and for a maximum ceiling price, as if this claim is sufficient to answer our argument that Section 121 is inconsistent with respondents' construction of Section 101(b)(5). It is not enough to prove that the rule of construction in Section 101(b)(5), through its reference to exemptions from maximum lawful prices, applies to deregulated gas as well as the various maximum lawful ceilings for regulated gas; respondents must also show that its construction of the section would be consistent with Section 121. Respondents cannot make this showing because FERC's construction of Section 101(b)(5), which makes the deregulated price applicable in such circumstances, not only is a valid construction of Section 101(b)(5) on its own terms, but the only one which is consistent with Section 121's direction that statutory ceiling prices "cease to apply."

2. Respondents claim (Brief 22) that FERC's interpretation of Section 101(b)(5) is impermissible because Section 101(b)(5) would have been drafted differently if Congress had intended to make the maximum lawful pricing provisions of the Act inapplicable to gas which had been deregulated: "Congress easily could have written a single sentence which clearly and simply provided for the price-deregulation of all gas qualifying in both regulated and deregulated categories." However, to say that Congress could have written Section 101(b)(5) in a simpler or clearer way is no help in ascertaining what Congress meant by the language it did use. Respondents' position cannot withstand scrutiny under the standard they propose, for it is respondents, and not FERC, that would have the Court, in effect, rewrite the statute and change the meaning of the words Congress used. Respondents argue that "Congress understood what it was saying" when it wrote Section 101(b)(5) stating that the "provision which could result in the highest price shall be applicable." In respondents' view, what Congress understood it was saying is "when a well is dually-qualified in a price regulated and a price-deregulated category, the category which could result in the highest sale price under the terms of the sales contract for that well will apply." But that is not what Congress actually said in Section 101(b)(5):

Respondents have changed the congressional language "which could result in the highest price" to "which would result in the highest price under applicable contracts." If, as respondents claim, Congress understood what it was saying, the Court must give the word "could" its ordinary meaning, as FERC did, and conclude that the "provisions" of the Act removing all statutory restraints on the price for the first sales of natural gas always "could result in the highest price." See *Reiter v. Sonotone*, 442 U.S. 330, 338-339 (1979). Contrary to respondents' position, there is nothing whatsoever in Section 101(b)(5) that suggests Congress said "could" when it meant "would," or that Congress intended a comparison of the terms of particular contracts. In respondents' view, had Congress so intended, Congress easily could have written a single sentence which clearly and simply provided for the application of the highest price regulated or deregulated which

would result under the language of the applicable contracts.

3. The extremely selective legislative history respondents cite does not advance their efforts to avoid deregulated prices. Respondents point primarily (Brief 26-27) to the language in the Explanatory Statement of Representative Dingell concerning the role producers must play in seeking gas classifications. As indicated in our opening brief (pp. 11-12), the Explanatory Statement states that Section 101(b)(5) "is intended to facilitate resolution of which ceiling price may apply if more than one ceiling price rule appears applicable." 124 Cong. Rec. 38,363 (1978). The rule is "[w]hichever ceiling price could result in the highest price is the applicable maximum lawful price." *Id.*

Immediately following are the statements upon which respondents rely:

of course this does not impose upon either the FERC or any state agency an affirmative obligation to identify which of several potential classifications should apply. It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him (in most cases that will be the designation which also yields the highest price).

*Id.* at 38,363-64. This portion of the Explanatory Statement simply is not related to the issue of whether producers can avoid the deregulation of sales of prescribed categories of gas mandated by Section 121. Instead, it indicates only that producers, and not government agencies, have the initial responsibility and related burdens of seeking the regulated classifications of their gas. The fact that in choosing in which regulated categories to seek qualification, Congress expected the producers would choose the category most favorable to them, cannot be stretched into a congressional understanding that, once the gas was deregulated, the sales contract rather than the Act itself, would determine what "provisions . . . could result in the highest price." On the contrary, immediately following the language of the Explanatory Statement cited by respondents, Representative Dingall made clear that where a producer

chooses to qualify its gas under both Section 108, and as "new gas" under Section 102, it could collect the higher 108 price "prior to January 1, 1985 [when Section 102 gas was deregulated] and deregulation of new gas thereafter." (124 Cong. Rec. 38,363 (1978)).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RAYMOND N. SHIBLEY  
BRIAN D. O'NEILL  
LeBoeuf, Lamb, Leiby &  
McRae  
1333 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

*Counsel for Panhandle  
Eastern Pipeline Company*

FREDERICK MORING  
HERBERT J. MARTIN  
Crowell & Moring  
1001 Pennsylvania Ave.,  
N.W.  
Washington, D.C. 20004-2505

*Counsel for Associated  
Gas Distributors*

RICHARD A. SOLOMON  
MARK N. MUTTERPERL  
Wilner & Scheiner  
Suite 300  
1200 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036

*Counsel for The Public Service  
Commission of the State of  
New York*

TERENCE J. COLLINS  
ROBERT BALLENTINE  
P. O. Box 2511  
Houston, Texas 77252-2511

*Counsel for Tennessee Gas  
Pipeline Company*

March 17, 1988

MOTION FILED  
JAN 14 1988

Nos. 87-363 and 87-364

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,  
*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

**MOTION OF WILLIAMS NATURAL GAS COMPANY  
FOR LEAVE TO FILE A BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE**

BOBBY POTTS  
Associate General Counsel  
THE WILLIAMS COMPANIES  
JOHN CARY  
Assistant General Counsel  
WILLIAMS NATURAL GAS  
COMPANY  
P.O. Box 2400  
Tulsa, OK 74102

DALE A. WRIGHT  
Counsel of Record  
JAMES T. MCMANUS  
MICHAEL E. SMALL  
WRIGHT & TALISMAN, P.C.  
1050 17th Street, N.W.  
Suite 600  
Washington, D.C. 20036  
(202) 331-1194

*Attorneys for  
Williams Natural Gas Company*

January 14, 1988

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

---

Nos. 87-363 and 87-364

---

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,  
*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

---

**MOTION OF WILLIAMS NATURAL GAS COMPANY  
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

---

Pursuant to Rule 36.3 of this Court's rules, Williams Natural Gas Company (WNG) hereby moves for leave to file the attached brief as *amicus curiae* in support of the petitioners urging reversal of *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059 (10th Cir. 1987). The necessity for this motion arises because WNG was unable to obtain the written consent of all parties to participate fully in this case as *amicus curiae*. WNG did, however, receive written consent to participate fully as *amicus curiae* from many of the key parties, including

the Federal Energy Regulatory Commission, all of the other petitioners, Shell Offshore, Inc. and Shell Western E & P Inc., and Martin Exploration Management Co.<sup>1</sup>

1. As explained more fully in the enclosed brief, WNG, which owns and operates a major interstate natural gas pipeline system, possesses a clear and direct interest in this case. In particular, WNG purchases natural gas under 1100 contracts for resale to direct industrial customers and gas distribution companies. The cost of a substantial portion of that gas will be directly affected by the outcome of this proceeding. WNG estimates that the Tenth Circuit's decision, if upheld, may cause WNG, its customers and ultimate consumers over \$100 million in additional costs for past purchases and over \$50 million in additional purchased gas costs for each future year. The magnitude of these amounts are such that WNG and its customers may face greater harm as a result of the Tenth Circuit's decision than any other interstate natural gas pipeline company.

2. Further, WNG's interest in this proceeding has been previously recognized by both the Tenth Circuit and this Court. The Tenth Circuit, for example, granted WNG's motion for leave to submit a brief as *amicus curiae* in support of the requests for rehearing of its March 9, 1987 decision in this case. By letter dated November 30, 1987, this Court similarly granted WNG's motion for leave to submit a brief as *amicus curiae* in No. 87-363 in support of the petitions for a writ of certiorari. Given this significant interest, WNG submits that it is necessary that it be allowed to submit the attached brief. Indeed, acceptance of this brief will help assure that the Court is fully apprised of all aspects of the issues in this case, particularly since WNG's ar-

---

<sup>1</sup> These written consent forms were submitted to the Court on September 21, 1987.

guments may differ in some respects from the arguments that will be raised by other parties.

WHEREFORE, WNG respectfully requests the Court to grant this motion and to accept and consider its attached brief as *amicus curiae* in support of the petitioners in this case.

Respectfully submitted,

BOBBY POTTS  
Associate General Counsel  
THE WILLIAMS COMPANIES  
JOHN CARY  
Assistant General Counsel  
WILLIAMS NATURAL GAS  
COMPANY  
P.O. Box 2400  
Tulsa, OK 74102

DALE A. WRIGHT  
Counsel of Record  
JAMES T. McMANUS  
MICHAEL E. SMALL  
WRIGHT & TALISMAN, P.C.  
1050 17th Street, N.W.  
Suite 600  
Washington, D.C. 20036  
(202) 331-1194

*Attorneys for  
Williams Natural Gas Company*

January 14, 1988

## TABLE OF CONTENTS

	Page
INTEREST OF WILLIAMS NATURAL GAS COMPANY .....	2
STATUTORY BACKGROUND .....	3
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	5
I. THE TENTH CIRCUIT CLEARLY ERRED IN REVERSING THE COMMISSION'S FIND- ING THAT THE NGPA MANDATES DE- REGULATION OF NATURAL GAS DUAL- LY QUALIFIED IN BOTH REGULATED AND DEREGULATED CATEGORIES .....	5
A. The Commission Correctly Concluded That NGPA Section 121 Mandated Deregulation of Natural Gas Dually Qualified In Both Regulated and Deregulated Categories .....	6
B. The Tenth Circuit Improperly Relied On An Erroneous Interpretation of Section 101 (b) (5) In Reversing the Commission .....	9
II. IF THE COURT WERE TO AFFIRM THE TENTH CIRCUIT, THEN ORDER NO. 406 SHOULD BE REVERSED ON A PROSPEC- TIVE-ONLY BASIS .....	11
CONCLUSION .....	16

## TABLE OF AUTHORITIES

<i>Cases:</i>	Page
Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 467 U.S. 380 (1984).....	5
American Bank and Trust Co. v. Dallas County, 463 U.S. 855 (1983) .....	8, 9
American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402 (1983) ..	5
Andrus v. Allard, 444 U.S. 51 (1979) .....	6, 8
Andrus v. Glover Construction Co., 446 U.S. 608 (1980) .....	8
Burlington Northern R. Co. v. Oklahoma Tax Comm., 107 S.Ct. 1855 (1987) .....	6
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) .....	4, 12, 13
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) .....	5
Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102 (1980) .....	9
Crane v. Comm. of Internal Revenue, 331 U.S. 1 (1947) .....	6
E.I. duPont de Nemours and Co. v. Collins, 432 U.S. 46 (1977) .....	5
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) .....	14
FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) .....	13
Malat v. Riddell, 383 U.S. 569 (1966) .....	6
Northern Pipeline Const. v. Marathon Pipeline Co., 458 U.S. 50 (1982) .....	12
Pennzoil Oil Co. v. FERC, 671 F.2d 119 (5th Cir. 1982) .....	6
Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396 (1961) .....	5
Public Service Commission of State of New York v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983) ..	3, 11
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) .....	5
Rubin v. United States, 449 U.S. 424 (1981) .....	6

## TABLE OF AUTHORITIES—Continued

	Page
State of Missouri <i>ex rel.</i> Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U.S. 276 (1923) .....	14
Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi, 106 S. Ct. 709 (1986) .....	9
Udall v. Tallman, 380 U.S. 1 (1965) .....	5
<i>Statutes:</i>	
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 <i>et seq.</i>	
Section 101, 15 U.S.C. § 3311 .....	3, 4, 9, 10
Section 102, 15 U.S.C. § 3312 .....	2, 3, 7, 9
Section 103, 15 U.S.C. § 3313 .....	2, 3, 7, 9
Section 104, 15 U.S.C. § 3314 .....	3
Section 105, 15 U.S.C. § 3315 .....	8
Section 107, 15 U.S.C. § 3317 .....	2, 3, 6, 9, 14, 15
Section 108, 15 U.S.C. § 3318 .....	3, 8, 9
Section 121, 15 U.S.C. § 3331 .....	3, 4, 6, 7, 9, 10, 11
Section 122, 15 U.S.C. § 3332 .....	11
<i>Miscellaneous:</i>	
Order No. 99, FERC Stats. & Regs. [Reg. Preambles] Para. 30,183 (1980) .....	15

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

---

Nos. 87-363 and 87-364

---

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,  
*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

---

**On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit**

---

**BRIEF FOR  
WILLIAMS NATURAL GAS COMPANY  
AS AMICUS CURIAE**

---

Pursuant to Rule 36 of this Court's rules, Williams Natural Gas Company (WNG) submits its brief as *amicus curiae* in support of the petitioners in Nos. 87-363 and 87-364. In this brief, WNG will demonstrate that the Tenth Circuit committed clear legal errors in reversing the Federal Energy Regulatory Commission's (Commission) interpretation of Title I of the Natural Gas Policy Act (NGPA).<sup>1</sup>

---

<sup>1</sup> The Tenth Circuit's decision in *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059 (1987) is set forth in the Ap-

## INTEREST OF WILLIAMS NATURAL GAS COMPANY

WNG possesses a clear and direct interest in this case. WNG owns and operates a major interstate natural gas pipeline system under various certificates of public convenience and necessity issued by the Federal Power Commission (FPC) or its successor, the Commission. WNG purchases gas under approximately 1100 gas purchase contracts and then transports and resells this gas primarily in Kansas and Missouri to distribution companies or to industrial customers served directly from its system. The distribution companies, in turn, resell this gas to approximately 2,900,000 ultimate consumers.

WNG purchases substantial amounts of gas dually qualified under both deregulated (*e.g.*, NGPA §§ 102(c) and 103(c))<sup>2</sup> and regulated (*e.g.*, NGPA § 107(c)(5))<sup>3</sup> NGPA categories. Under Order No. 406, WNG was able to reduce the price of much of its dually qualified gas to measurably lower market oriented prices. The Tenth Circuit's reversal of Order No. 406, however, if upheld, will result in substantially higher prices for dually qualified gas. WNG estimates that such higher prices may cause WNG, its customers and the ultimate consumers increased costs totalling over \$100 million for past purchases and over \$50 million in additional purchased gas costs for each future year.

pendix at 1a-33a. The Commission's rulemaking orders (Order Nos. 406 and 406-A), which are before this Court, are set forth in the Appendix at 61a-131a.

<sup>2</sup> 15 U.S.C. § 3312(c), covering "new" natural gas from new reservoirs, certain new OCS leases, or new wells drilled a certain distance from existing "marker" wells. 15 U.S.C. § 3313(c), covering "New onshore production wells."

<sup>3</sup> 15 U.S.C. § 3317(c)(5), covering gas that involved high cost production which the Commission found to present extraordinary risks or costs, and therefore provided higher ceiling prices.

## STATUTORY BACKGROUND

In enacting the NGPA, "Congress comprehensively and dramatically changed the method of pricing natural gas produced in the United States." *Public Service Commission of State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 322 (1983). In order to effect this change, Congress in Title I of the NGPA established "an exhaustive categorization of natural gas production." *Id.* at 332. Under this categorization, Congress immediately deregulated gas in a number of categories,<sup>4</sup> provided for phased deregulation of gas in other categories,<sup>5</sup> and provided for permanent regulation of the remaining natural gas categories.<sup>6</sup> The issue in this case arises because some natural gas has qualified in two categories, one regulated and the other deregulated.

## SUMMARY OF ARGUMENT

The only issue in this case involves the treatment of natural gas which is dually qualified under regulated and deregulated NGPA categories. In a rulemaking, Order No. 406, the Commission found that NGPA Section 121 required deregulation of such dually qualified natural gas. The Tenth Circuit, in contrast, found that NGPA Section 121 was ambiguous but that NGPA Section 101(b)(5) places in the hands of natural gas producers the right to choose whether their gas should be regulated or deregulated.

The Commission's interpretation was a reasonable one and, thus, should be accepted, particularly in view of the very substantial deference due Commission interpreta-

<sup>4</sup> See *e.g.*, NGPA Sections 107(c)(1)-(4) (15 U.S.C. § 3317(c)(1)-(4)).

<sup>5</sup> See *e.g.*, NGPA Sections 102(c) (15 U.S.C. § 3312(c)) and 103 (15 U.S.C. § 3313).

<sup>6</sup> See *e.g.*, NGPA Sections 104 (15 U.S.C. § 3314), 107(c)(5) (15 U.S.C. § 3317(c)(5)), and 108 (15 U.S.C. § 3318).

tions of the NGPA, a statute which it has been entrusted to administer. The Commission based its interpretation primarily on NGPA Section 121. The plain and unambiguous language of that provision mandates deregulation of the dually qualified gas at issue here. Indeed, any contrary interpretation, would by implication add an additional exception for dually qualified gas to the two expressly stated exceptions contained in Section 121. The Court has previously found similar exceptions by implication to be improper. The reasonableness of the Commission's interpretation of Section 121 is also supported by the underlying legislative history of the NGPA.

The Tenth Circuit reversed the Commission based primarily on its reading of NGPA Section 101(b)(5). The Tenth Circuit's interpretation of Section 101(b)(5), however, produces certain anomalous results which clearly show the unreasonableness of such an interpretation. Further, the Commission interpreted Section 101(b)(5) as being consistent with the deregulation of dually qualified natural gas. Since that interpretation was based on a reading of the statutory language in its ordinary, everyday sense, and that reading was a reasonable one, the Commission's interpretation of Section 101(b)(5), and not the Tenth Circuit's interpretation, should be accepted by the Court.

Finally, if this Court were to affirm the Tenth Circuit's decision, the resulting reversal of the Commission's rule should be on a prospective-only basis. Under the *Chevron Oil* standards, such prospective-only treatment is clearly warranted. Absent such prospective-only treatment, natural gas pipelines, their customers, and ultimate consumers will suffer very substantial harm.

## ARGUMENT

### I. THE TENTH CIRCUIT CLEARLY ERRED IN REVERSING THE COMMISSION'S FINDING THAT THE NGPA MANDATES DEREGULATION OF NATURAL GAS DUALLY QUALIFIED IN BOTH REGULATED AND DEREGULATED CATEGORIES

There can be no doubt that the Commission's interpretation of the NGPA is entitled to substantial deference. As the Court stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984): "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Accord Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 385 (1984); *Udall v. Tallman*, 380 U.S. 1, 16 (1965), quoting *Power Reactor Development Co. v. International Union of Electric, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). Thus, the Commission's interpretation of the NGPA can only be overturned if "there are compelling indications that it is wrong." *E.I. duPont de Nemours and Co. v. Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

Further, in view of the very substantial deference due the Commission, this Court "need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Aluminum Co. of America v. Central Lincoln People's Utility Dist.*, 467 U.S. at 389, quoting *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 422-23 (1983) (insertion in original). The Court "need only conclude that it is a reasonable interpretation of the relevant provisions." *Id.* (emphasis in original).<sup>7</sup>

<sup>7</sup> Deference to the Commission is particularly warranted in this case since much of the dually qualified natural gas qualifies as Sec-

Against this backdrop, the Commission's interpretation of the NGPA should be affirmed and the Tenth Circuit reversed. While perhaps not the only possible interpretation, the Commission's interpretation was nonetheless a reasonable one.

**A. The Commission Correctly Concluded That NGPA Section 121 Mandated Deregulation Of Natural Gas Dually Qualified In Both Regulated And Deregulated Categories**

In interpreting a statute, the "point of departure . . . is the language of the enactment," *Andrus v. Allard*, 444 U.S. 51, 56 (1979), with that language interpreted in its "'ordinary, everyday sense[]'," *Malat v. Riddell*, 383 U.S. 569, 571 (1966), quoting *Crane v. Comm. of Internal Revenue*, 331 U.S. 1, 6 (1947). If, after analysis of the statute, the Court finds "'the terms of a statute unambiguous, judicial inquiry is complete'" "unless exceptional circumstances dictate otherwise." *Burlington Northern R. Co. v. Oklahoma Tax Comm.*, 107 S.Ct. 1855, 1860 (1987), quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981). Consistent with these precepts, the Commission analyzed the plain language of NGPA Section 121, interpreted in its ordinary, everyday meaning, and concluded that the unambiguous language of Section 121 mandated deregulation of natural gas dually qualified in both regulated and deregulated categories.

1. An analysis of the language of Section 121 shows the reasonableness of the Commission's interpretation. In particular, Section 121(a) provides in pertinent part that:

tion 107(c)(5) gas. The Commission has very broad discretion over the price to be charged for that gas. *See Pennzoil Co. v. FERC*, 671 F.2d 119, 126 (5th Cir. 1982) ("[t]he authority delegated by Congress [with regard to NGPA Section 107(c)(5)] was broad indeed: responsibility for both the identification of gas to which such incentives should be extended and the determination of the appropriate maximum lawful incentive price . . .").

Subject to the reimposition of price controls as provided in section 122 of this title, *the provisions of part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e) of this section, cease to apply effective January 1, 1985:*

(1) *New natural gas.*—New natural gas (as defined in section 102(c) of this title.)

(2) *New, onshore productions wells.*—Natural gas produced from any new, onshore production well (as defined in section 103(c) of this title), if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of more than 5,000 feet.

\* \* \* \* \*

(emphasis added). The "provisions of part A" refers to the ceiling prices set forth in Title I of the NGPA. The two noted exceptions refer to Alaska Natural Gas and indefinite price escalators. There is no provision exempting dually qualified gas to any extent whatsoever.

NGPA Section 121, thus, deregulates Section 102(c) and 103(c) natural gas, subject to very limited exceptions that have no pertinence to this case. This is significant because all of the natural gas at issue here qualified for pricing treatment under either Section 102(c) or 103(c). While this gas has also qualified for pricing under other regulated categories, since Congress did not create an exception to Section 121 for dually qualified gas, the dual qualification of that gas has no significance. Under Section 121, that gas is still deregulated.

Therefore, as the Commission found (App. at 75a-76a), the plain language of NGPA Section 121 provided

for the deregulation of the dually qualified gas at issue in this case. At the very least, an analysis of the language of Section 121 shows that the Commission had a reasonable basis for concluding that Section 121 mandated deregulation of this gas.

2. Indeed, any finding to the contrary would by implication add an additional exception to Section 121 for dually qualified gas. Because Section 121 already explicitly delineates two exceptions to the general deregulation mandate, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." See *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); accord *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983); *Andrus v. Allard*, 444 U.S. at 56.

3. Further, as also noted by the Commission (App. at 108a-109a), the underlying legislative history of the NGPA supports this interpretation of Section 121. Senator Bartlett, in a discussion of the conference report, stated:

[I]n informal discussions on the floor it has been asserted that stripper<sup>[8]</sup> wells are deregulated. This is true only to the extent that such wells are otherwise new wells and would be deregulated anyway. Their character as stripper wells, as shown under Section 121, does not get them deregulated in any way.

Cong. Rec. S. 15997 (September 25, 1978), 124 Cong. Rec. 31387 (1987) (emphasis added).<sup>9</sup>

<sup>8</sup> NGPA Section 108, 15 U.S.C. § 3318.

<sup>9</sup> The Tenth Circuit (App. at 22a) discounted this statement based on a statement in the Conference Report discussing NGPA Section 105 (15 U.S.C. 3315) that stripper gas would remain subject to Section 108 pricing rather than being deregulated "as an existing intrastate contract" under Section 105. That conference report statement has no pertinence to the instant case because it

Senator Bartlett's statement indicates that Congress intended for natural gas qualifying in both regulated and deregulated categories to be deregulated. Indeed, such a statement is not surprising given other Congressional indications that the NGPA was intended to result in market-based pricing for high-cost gas, a desire which can only be satisfied if Order No. 406 is affirmed.<sup>10</sup> See e.g., *Transcontinental Gas Pipeline Co. v. State Oil and Gas Board*, 106 S.Ct. 709, 716-17 (1986) (in the NGPA, Congress determined "that the supply, the demand, and the price of high-cost gas [should] be determined by market forces").

Therefore, the Commission's conclusion that NGPA Section 121 mandated deregulation of dually qualified gas was a reasonable one. That conclusion which was derived from the statutory language and which is consistent with Congressional intent, is to be regarded as conclusive. See *American Bank and Trust Co. v. Dallas County*, 463 U.S. at 862, quoting *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

#### **B. The Tenth Circuit Improperly Relied On An Erroneous Interpretation Of Section 101(b)(5) In Reversing The Commission**

The primary basis for the Tenth Circuit's reversal was its conclusion that NGPA Section 101(b)(5) allowed

pertained to intrastate gas under Section 105 sold under a contract containing an indefinite price escalation provision, rather than the deregulated categories at issue here which involve Section 102(c) and 103(c) gas. Indeed, in contrast to Sections 121(a)-(c), Section 121(d) maintains maximum lawful prices for intrastate gas sold under a contract containing an indefinite price escalation provision. Thus, the statement in the Conference Report is consistent with the statutory language.

<sup>10</sup> The regulated categories, e.g., §§ 107(c)(5) and 108, associated with this dually qualified gas are high-cost categories with ceiling prices some two-three times above current market clearing prices.

producers of dually qualified gas to choose whether their gas would be regulated or deregulated. The Tenth Circuit's conclusion is legally flawed and cannot be sustained, since the Commission's interpretation of Section 101(b)(5) was clearly reasonable.

1. Section 101(b)(5) provides in pertinent part that:

If any natural gas qualifies under more than one provision of this subchapter . . . , the *provision which could result in the highest price shall be applicable.* (emphasis added)

The Commission focused on the plain language of this section and found that this provision was consistent with and supported the deregulation of dually qualified natural gas pursuant to Section 121. App. at 110a-111a.

The Commission's conclusion was certainly a reasonable one since the Commission focused on the language of the statute and interpreted that language based on its "ordinary, everyday" meaning. See p. 6, *supra*. In evaluating this statutory provision, the Commission focused on the word "could" and found that "[w]ithout question, a deregulated price *could* always result in a price higher than a regulated price which is subject to a ceiling price." App. at 111a (emphasis in original). There can be no doubt that this reading of Section 101(b)(5) is consistent with the plain words of that provision and, indeed, the Tenth Circuit has conceded this fact (App. at 15a). Thus, the Commission had a reasonable basis in concluding that Section 101(b)(5) supported deregulating natural gas which dually qualified in both regulated and deregulated categories.

2. Further, because the Tenth Circuit's interpretation of Section 101(b)(5) leads to some anomalous results, anomalies that are not present under the Commission's interpretation, the court's interpretation cannot be accepted. For example, the Tenth Circuit's interpretation establishes a price floor. App. at 23a. As this Court has

recognized, however, the NGPA established *ceiling* prices. See *Public Service Commission of New York v. Mid-Louisiana Gas Co.*, 463 U.S. at 339. Nowhere in the NGPA, in fact, is there any mention of price floors. Similarly, the Tenth Circuit recognized that its interpretation of the statute would render renegotiation provisions in a large number of contracts meaningless. App. at 17a.

Lastly, the Tenth Circuit's decision would allow producers to choose to deregulate natural gas for a finite period of time and then to subsequently obtain regulation of the same gas. The NGPA expressly provided, however, for gas to be forever deregulated once it was deregulated except under certain very limited circumstances which are not present here. See *e.g.* NGPA Section 121(a). Indeed, the only NGPA provision which allows for price controls to be reimposed is Section 122 (15 U.S.C. § 3332). Such reimposition, however, can only occur by action of the President or Congress. Thus, the Tenth Circuit's interpretation greatly expands Section 122 by allowing natural gas producers, in addition to the President or Congress, to reinstitute price controls. Clearly, such an interpretation should not be allowed to stand.

**II. IF THE COURT WERE TO AFFIRM THE TENTH CIRCUIT, THEN ORDER NO. 406 SHOULD BE REVERSED ON A PROSPECTIVE-ONLY BASIS**

As detailed above, WNG strongly believes that the Tenth Circuit's interpretation of the NGPA was in error. If the Court, however, affirms the Tenth Circuit's interpretation, then the reversal of the Commission's Order No. 406 should be made effective on a prospective-only basis.<sup>11</sup> This is necessary to prevent gross inequity to natural gas pipelines and their customers.

<sup>11</sup> By prospectively, we mean prospective from the date of any opinion of this Court.

In determining whether to apply a decision retroactively or prospectively, this Court considers three separate factors:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must \* \* \* weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'

*Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), omissions in original citations; see also *Northern Pipeline Const. v. Marathon Pipeline Co.*, 458 U.S. 50, 87-88 (1982) (effect of decision was to have a prospective-only application even though Court found statute unconstitutional).

In the instant case, the first *Chevron Oil* factor warrants nonretroactivity because this case involves an issue of first impression. Reversal of Order No. 406 also could not have been reasonably foreshadowed because the Commission's interpretation of the NGPA is supported by the plain language of the statute, as noted above. Given the substantial deference accorded such a Commission interpretation, parties had a reasonable basis in relying on Order No. 406. Indeed, reliance on Order No. 406 was particularly warranted because a number of natural gas producers, including at least one seeking reversal of Order No. 406 in this case, had previously interpreted

the NGPA in a manner consistent with Order No. 406. App. at 112a-113a.

The second and third *Chevron Oil* factors similarly justify nonretroactive treatment. Natural Gas producers, after all, have been collecting the lower deregulated price since January 1, 1985. Presumably producers have made investment decisions based on that lower price, since, as discussed above, many producers at one time believed that the Commission's interpretation was the correct one. Because investments in past periods have already been made and cannot be retroactively changed, a court order making the higher price effective retroactive would thus likely have no effect on investments by natural gas producers and would merely provide producers with a wind-fall.

In contrast, retroactive application of a decision affirming the Tenth Circuit would result in very substantial harm to natural gas pipelines and their customers. Natural gas pipelines would need to collect hundreds of millions of dollars for past gas purchases from their customers, that in turn, would collect these amounts from the ultimate consumer. These customers would be harmed not only by the collection of such large amounts for past purchases, but substantial intergenerational equity problems would exist in that many of the ultimate consumers would evade their fair share of the costs, with those costs borne, at least in part, by other consumers. Cf. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962) ("the transient nature of our society . . . often prevents refunds from reaching those to whom they are due").

It should be noted that recovery of these amounts by pipelines may, in fact, be difficult because of the current intense competition with alternate fuels, such as fuel oil and spot gas, being experienced by many natural gas pipelines. In these highly competitive times, minor in-

creases in gas costs can have a substantial detrimental effect on a pipeline's ability to sell gas. The very large increases which may be faced by some pipelines will surely have a disastrous effect on those companies' sales and may prevent such companies from recovering all of the retroactive amounts due natural gas producers if the Tenth Circuit is affirmed. Such a result would be contrary to long established principles of public utility ratemaking. See *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 291 (1923) (Brandeis concurring) (the Constitution guarantees public utilities "the reasonable cost of conducting the business"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business").

Further, many of the dollars at issue here involve tight formation natural gas<sup>12</sup> qualifying for an incentive price under NGPA Section 107(c)(5), as well as under a deregulated category. As noted on page 5 n.7, *supra*, special deference is owed the Commission with regard to such 107(c)(5) gas because Congress expressly delegated to the Commission the regulation of this high cost gas. See NGPA Section 107(b), 15 U.S.C. § 3317(b). While the Commission was given broad authority to regulate such high-cost gas, Congress only allowed the Commission to provide for an incentive price for 107(c)(5) gas to the extent "necessary to provide reasonable incentives for the production of such high cost natural gas." *Id.*

In discharging its duties with regard to this high cost gas, the Commission found that the incentive price was only "necessary" on an interim basis through January 1,

<sup>12</sup> The ceiling price for Section 107(c)(5) gas is currently in excess of \$6.40 per MMBtu, or over three times the market clearing price.

1985.<sup>13</sup> And, as a means of eliminating the interim Section 107(c)(5) price for the post-January 1, 1985 period for much of the gas qualifying under that section, the Commission issued Order No. 406.

Thus, if Order No. 406 were ultimately reversed and applied retroactively, the Commission's efforts in carrying out its statutory responsibilities under Section 107 would be severely disrupted. Natural gas producers, after all, would be allowed to collect this extremely high interim price for some three years after the prices were to have been eliminated and during a time period when such prices were unnecessary. Prospective-only application of any affirmance of the Tenth Circuit's decision would avoid this inequitable and unlawful result.

<sup>13</sup> There is no doubt the Commission intended the tight formation price to be an interim price until deregulation as shown by the following discussion from the rulemaking which promulgated the tight formation incentive price:

[T]he focus of our pricing inquiry is to determine the necessary incentive for the transition period between now and 1985. It is our intention to establish a price that will stimulate production of gas from tight formations during the transition period.

Order No. 99, FERC Stats. & Regs. [Reg. Preambles] Para. 30,183, p. 31,266 (1980).

**CONCLUSION**

For the foregoing reasons, the Federal Energy Regulatory Commission's Order No. 406 should be affirmed and the Tenth Circuit's action on Order No. 406 reversed. If the Court, however, were to affirm the Tenth Circuit, then the resulting reversal of Order No. 406 should occur on a prospective-only basis.

Respectfully submitted,

BOBBY POTTS

Associate General Counsel

THE WILLIAMS COMPANIES

JOHN CARY

Assistant General Counsel

WILLIAMS NATURAL GAS

COMPANY

P.O. Box 2400

Tulsa, OK 74102

DALE A. WRIGHT

Counsel of Record

JAMES T. McMANUS

MICHAEL E. SMALL

WRIGHT & TALISMAN, P.C.

1050 17th Street, N.W.

Suite 600

Washington, D.C. 20036

(202) 331-1194

*Attorneys for*

*Williams Natural Gas Company*

January 14, 1988

MOTION FILED  
JAN 14 1988

Nos. 87-363 and 87-364

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

---

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,  
*Petitioners,*

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents.*

---

On Writ of *Certiorari* to the United States  
Court of Appeals for the Tenth Circuit

---

MOTION OF  
INTERSTATE NATURAL GAS ASSOCIATION  
OF AMERICA FOR LEAVE TO FILE BRIEF  
AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS

---

JOHN H. CHEATHAM, III \*  
EDWARD B. MYERS  
INTERSTATE NATURAL GAS  
ASSOCIATION OF AMERICA  
Suite 601  
1660 L Street, N.W.  
Washington, D.C. 20036  
(202) 293-5770  
*Attorneys for Amicus Curiae*

\* Counsel of Record

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

---

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,  
v. *Petitioners*,  
MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents*.

---

On Writ of *Certiorari* to the United States  
Court of Appeals for the Tenth Circuit

---

**MOTION OF INTERSTATE NATURAL GAS  
ASSOCIATION OF AMERICA FOR LEAVE  
TO FILE BRIEF AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

---

The Interstate Natural Gas Association of America ("INGAA")<sup>1</sup> hereby moves for leave to file the accompanying brief *amicus curiae* in the captioned matter. This motion is being filed in accordance with this Court's Rule 36.

INGAA, as an organization representing virtually all of the major interstate natural gas transmission companies, has a strong interest in this proceeding and has been actively involved in this case since the Tenth Circuit's decision. In that decision and Judgment, the Tenth Circuit reversed the Federal Energy Regulatory

---

<sup>1</sup> The member companies of INGAA are listed in the attached appendix to this brief.

Commission's (Commission) interpretation of Section 121 of the Natural Gas Policy Act of 1978 (NGPA) and imposed its own interpretation in lieu of the Commission's, causing substantial adverse impact upon interstate pipelines and the natural gas consumers which they serve.

Because of the substantial adverse impact of the Tenth Circuit's decision, INGAA filed a motion on September 21, 1987 for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* which had been filed by the Commission. These motions became necessary because six of the parties to this case had not consented to INGAA's participation in these proceedings; all of the remaining parties had consented in INGAA's full participation.<sup>2</sup> By an unpublished order entered November 30, 1987, INGAA's motion to file its brief *amicus curiae* in support of the petition for a writ of *certiorari* was granted.

In its earlier motion, INGAA set forth fully the facts showing the industry-wide importance of this case and the nature of INGAA's interest in it. INGAA will not repeat all of that discussion here, but respectfully refers the Court to that prior motion. However, it is especially important to emphasize two factors demonstrating that this motion should also be granted: (i) INGAA's interest, as a representative of virtually all major interstate pipelines, is obviously not identical to the regulators' interest of the Commission or the Public Service Commission of the State of New York (Petitioner in No. 87-364) even though INGAA supports the Commission's interpretation of the NGPA before this Court; and (ii) it was not until the Tenth Circuit imposed its own interpretation of NGPA Section 121 upon the Commission and

<sup>2</sup> Copies of the letters evidencing that consent have previously been lodged with the Clerk of the Court. INGAA has not made any further attempts to obtain the consent of the six parties who have previously refused since any such effort would obviously be futile.

the Commission and the natural-gas pipeline industry that INGAA's interests were adversely impacted.

The industry-wide importance of this case and INGAA's strong interest in its outcome have not abated since the Court granted INGAA's motion. Indeed, if anything, that interest has grown stronger because the higher gas costs which will result from the Tenth Circuit's erroneous decision continue to accrue. The same factors which justified granting INGAA's motion for leave to file its prior brief *amicus curiae* also warrant the Court granting the instant motion for leave to file the attached brief *amicus curiae* on the merits.

The Commission order under review herein is a generic rulemaking order which, if modified as ordered by the Tenth Circuit, will have a widespread impact on many of the pipeline industry participants. Due to its broad membership base, INGAA will be able to offer the Court a perspective on this case which may be broader than the narrow parochial interests of the individual private parties.

WHEREFORE, for the reasons stated above, and for the reasons stated in INGAA's motion for leave to file its brief *amicus curiae* in support of the petition for a writ of *certiorari*, INGAA respectfully prays that this Court receive the attached brief *amicus curiae* for filing.

Respectfully submitted,

JOHN H. CHEATHAM, III \*  
EDWARD B. MYERS  
INTERSTATE NATURAL GAS  
ASSOCIATION OF AMERICA  
Suite 601  
1660 L Street, N.W.  
Washington, D.C. 20036  
(202) 293-5770  
*Attorneys for Amicus Curiae*  
\* Counsel of Record

January 14, 1988

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
INTEREST OF THE <i>AMICUS CURIAE</i> .....	2
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	7
I. The Tenth Circuit's Interpretation Is Incon- sistent with the Purpose and Legislative His- tory of the NGPA .....	7
II. The Tenth Circuit's Decision Produces Anoma- lous and Absurd Results .....	11
III. The Tenth Circuit's Decision Is Inconsistent with the Plain Meaning of the Statute .....	14
IV. The Tenth Circuit's Decision Should Be Re- versed under This Court's Decision in <i>Chevron</i> Requiring Judicial Deference .....	18
CONCLUSION .....	19

## TABLE OF AUTHORITIES

Cases:	Page
<i>Atlantic Refining Co. v. Public Service Commission of New York</i> , 360 U.S. 378, 391-93 (1959) ..	8
<i>Barnson v. United States</i> , 816 F.2d 549 (10th Cir. 1987) ..	16
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984) ..	6, 14, 18
<i>Commissioner v. Brown</i> , 380 U.S. 563 (1965) ..	14
<i>Consumer Product Safety Commission v. GTE Sylvania Inc.</i> , 447 U.S. 102 (1980) ..	15
<i>Firestone v. Howerton</i> , 671 F.2d 317 (9th Cir. 1982) ..	16
<i>Greater Boston Television Corp. v. Federal Communications Commission</i> , 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) ....	6, 14
<i>Martin Exploration Management Company, et al. v. Federal Energy Regulatory Commission</i> , 813 F.2d 1059 (Nos. 84-2756, et al., 10th Cir., decided March 9, 1987, as modified on May 1, 1987) ..	passim
<i>Offshore Logistics, Inc. v. Tellentire</i> , 106 S.Ct. 2485 (1986) ..	17
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968) ..	19
<i>Perrin v. United States</i> , 444 U.S. 37 (1979) ..	16
<i>Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.</i> , 463 U.S. 319 (1983) ..	5, 8
<i>Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi</i> , 106 S.Ct. 709 (1986) ..	5, 8, 10
<i>United States v. Nunez</i> , 573 F.2d 769 (2nd Cir.), cert. denied, 436 U.S. 930 (1978) ..	16
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157 (1968) ..	19
<i>United States v. Stauffer Chemical Co.</i> , 684 F.2d 1174 (6th Cir. 1982), aff'd, 464 U.S. 165 (1984) ..	16
<i>United States v. Turkette</i> , 452 U.S. 576 (1981) ..	14

## TABLE OF AUTHORITIES—Continued

Statutes:	Page
Department of Energy Organization Act, 42 U.S.C. §§ 7101, et seq. ....	2
Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, et seq. ....	passim
Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301, et seq. ....	passim
Section 101 (b) (5) ..	passim
Section 101 (b) (9) ..	11
Section 102 (c) ..	13, 16
Section 108 ..	13
Section 121 ..	passim
Section 311 (b) (7) ..	17
Section 315 (b) ..	17
Section 503 (c) (2) ..	17
Section 504 (b) (1) ..	17
Miscellaneous:	
Natural Gas Policy Act Information Service, Para. 101:230 (legislative history of the NGPA—remarks of Congressman Dingell) ..	13

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

---

Nos. 87-363 and 87-364

---

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,  
*Petitioners*,  
v.  
MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,  
*Respondents*.

---

On Writ of *Certiorari* to the United States  
Court of Appeals for the Tenth Circuit

---

BRIEF OF  
INTERSTATE NATURAL GAS ASSOCIATION  
OF AMERICA AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS

---

The Interstate Natural Gas Association of America ("INGAA"), in accordance with this Court's Rule 36, has received the written consent of several of the parties to participate fully in this case as *Amicus Curiae*. Copies of these consent letters have been filed with the Clerk.<sup>1</sup>

---

<sup>1</sup> Even though this case is of industry-wide importance, certain gas producer-respondents declined to give their consent to INGAA's participation when INGAA sought to file a brief *amicus* in support of the Commission's petition for writ of *certiorari* to the Tenth Circuit. That INGAA brief *amicus* was subsequently accepted for filing by this Court (see "Motion of Interstate Natural Gas Association of America for Leave to File Brief as *Amicus Curiae* in Support of Petitioners", attached, *supra*).

This brief is in support of the Petitioners, the Federal Energy Regulatory Commission ("Commission") (No. 87-363), Public Service Commission of the State of New York, Panhandle Eastern Pipeline Company, Tennessee Gas Pipeline Company, and Associated Gas Distributors (No. 87-364). For the reasons appearing below, INGAA prays that the Judgment of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *Martin Exploration Management Company, et al. v. Federal Energy Regulatory Commission*, 813 F.2d 1059 (Nos. 84-2756, *et al.*, 10th Cir., decided March 9, 1987, as modified on May 1, 1987), be reversed. App. 1a.<sup>2</sup>

#### INTEREST OF THE AMICUS CURIAE

INGAA is a nonprofit national association whose members represent virtually all of the major interstate natural gas transmission companies operating in the United States. INGAA's members (listed in the appendix attached to this brief) account for over 90% of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Commission under various provisions of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*; the Department of Energy Organization Act, 42 U.S.C. §§ 7101, *et seq.*; and the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3201, *et seq.* The decision of the Tenth Circuit is not consistent with the clear intent and meaning of the NGPA as interpreted by this Court and, unless reversed, will result in substantial prejudice to interstate pipelines and ultimate consumers of natural gas.

#### STATEMENT OF THE CASE

This case involves Commission rules relating to dual-category gas, *i.e.*, gas which is qualified under an NGPA pricing category and is also qualified for deregulation

<sup>2</sup> "App." refers to the Appendix to the Commission's petition for a writ of *certiorari* filed in No. 87-363 on August 31, 1987.

under NGPA Section 121. The Commission's orders implement NGPA Section 121 which states that "the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall . . . cease to apply effective January 1, 1985." The Commission, applying Section 121, held that the provisions in that section expressly deregulating one of the two categories must result in the treatment of the subject gas as deregulated under the statute.<sup>3</sup>

The Commission rejected arguments that its interpretation of Section 121 conflicts with NGPA Section 101 (b) (5).<sup>4</sup> The Commission concluded that Section 101 (b) (5), which states that for dually-qualified gas "the provision [of Title I—Wellhead Pricing] which could result in the highest price shall apply," does not override the express deregulation mandate of Section 121. The Commission read Section 101 (b) (5) as referring to the price resulting from deregulation and not to the price effective under the regulated pricing category in which dual-qualified gas has been qualified. The Commission reached this conclusion based upon the finding that the deregulated price "could result in the highest price" because that price is subject to no legal limitation and the parties "could" always negotiate a price higher than the regulated ceiling price.

In summary, the Commission concluded that NGPA Sections 121 and 101 (b) (5) are to be applied independently of private contracts, on the ground that "whether

<sup>3</sup> "Deregulation appears to be mandatory. Producers cannot opt out of the statutory scheme on January 1, 1985, merely because market conditions are unfavorable." App. 76a.

<sup>4</sup> "(5) SALES QUALIFYING UNDER MORE THAN ONE PROVISION. —If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable." 15 U.S.C. 3311 (b) (5).

the *contract* allows the producer to collect a price higher than a regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA." App. 111a (footnote omitted). In the Commission's view, private contracts should not control whether first-sale gas is regulated or deregulated; rather, the statute should control.

Reversing the Commission's construction of the statute, the Tenth Circuit agreed that the Commission's interpretation of NGPA Section 121 would be reasonable, standing alone:

"We conclude that § 121 is ambiguous. Therefore, in the absence of another provision in the statute, FERC's determination that dual category gas is to be considered deregulated would be a reasonable interpretation of the ambiguous language of § 121." 813 F.2d at 1066; App. 11a.

However, the Court went on to hold that the Section 101(b)(5) phrase "could result in the highest price" *must* be read as referring to the highest price resulting from *actual market conditions at each particular moment*. 813 F.2d at 1068; App. 16a. This finding, which is the linchpin of the Tenth Circuit's rationale, fails to accept and give weight to the meaning which the Commission explicitly ascribed to the phrase, *i.e.*, that, in the case of dually-qualified gas, the "highest price" to which Section 101(b)(5) refers is the legally unrestricted, deregulated price.

### SUMMARY OF ARGUMENT

1. The Tenth Circuit's interpretation is inconsistent with the purpose and history of the NGPA. The NGPA redefined and replaced the NGA cost-based standard with higher "just and reasonable" price ceilings for "first-sale" gas and, thereafter, with phased-in deregulation through elimination of the statutory ceilings. Those ceilings, and the subsequent deregulation provisions of

NGPA Section 121, were included in light of the ultimate statutory goal of using market forces to *balance* the supply and demand for natural gas. *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 106 S. Ct. 709, 716 (1986) ("*Transco*"). The Commission's interpretation of NGPA Section 121 to deregulate dual-qualified gas is consistent with this overriding statutory objective. The Tenth Circuit's forced interpretation of the NGPA plainly is not.

To achieve the *desideratum* of a gas supply and demand balance, Congress in NGPA Section 121 made most of these NGPA price ceilings temporary.<sup>5</sup> In the short run, they would serve as incentives to the extent that they permitted prices to rise above cost-based levels of the NGA; but they would also serve as limits upon the operation of free market forces to the extent that those forces continued to warrant higher prices. In the longer run, the ceilings were to be phased out, to be replaced by market forces altogether—the ultimate goal.

The Tenth Circuit's interpretation turns the congressional intent on its head because it makes price *floors* of the congressionally prescribed price *ceilings* and extends regulation in the face of a clear congressional intent to deregulate.

2. The Tenth Circuit imposed its own interpretation of the statute upon the Commission and the natural gas industry while conceding that its interpretation pro-

<sup>5</sup> As this Court explained previously in its *Mid-La II* opinion:

"For some categories of gas, the NGPA ceiling prices are an intermediate step on the path from a fully regulated industry to a deregulated industry. Sections 121 and 122 of the NGPA provide a mechanism for the ultimate decontrol of a number of categories of natural gas."

Public Service Commission of the State of New York v. Mid-Louisiana Gas Co., 463 U.S. 319, 336 n.14 (1983).

duces "an anomaly in the operation of the NGPA in certain circumstances \* \* \*." 813 F.2d at 1069 n. 11; App. 17a. Indeed, the Tenth Circuit *twice* conceded that its interpretation produces such anomalies. 813 F.2d at 1071; App. 23a.

The Tenth Circuit's decision constitutes an unwarranted intrusion into the administrative process. This is evident in light of the anomalous impacts of the Court's interpretation and the fact that the Commission, not the Tenth Circuit, is the agency charged by Congress with the administration of the NGPA.<sup>6</sup> Further, the Tenth Circuit's admission of such anomalies demonstrates that its order imposing the substitute interpretation does not meet the "reasoned decisionmaking" standard against which courts routinely measure decisions of the Commission.<sup>7</sup> In the circumstances here present, the Tenth Circuit had a duty to defer to the Commission's interpretation of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("*Chevron*").

3. The Tenth Circuit's decision is also inconsistent with the plain meaning of the statute. Violating well-established principles of statutory construction, the Tenth Circuit's interpretation of the NGPA assumes that when Congress used the phrase "could result in the highest price" it used the word "could" as synonymous with "would" or "will" as if the phrase reads "*will* result in the highest price." There is no support for such an interpretation of the statute.

<sup>6</sup> As a hypothetical proposition, it seems compelling (all things being equal) that Congress should be called upon to correct an agency's misinterpretation rather than a reviewing court's misinterpretation, given the jurisdictional fact that Congress charged the agency with the duty to construe and execute the statute's provisions.

<sup>7</sup> *E.g.*, *Greater Boston Television Corp. v. Federal Communications Commission*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

The Tenth Circuit's conversion of "could" to "will" is inconsistent with other portions of the statute and does violence to the plain meaning of the statutory language. It also produces a result which is wholly at odds with Congress' objective to achieve *deregulation* of wellhead prices as reflected in NGPA Section 121.

4. The Tenth Circuit's decision should be reversed under this Court's decision in *Chevron, supra*, requiring judicial deference. Under *Chevron*, the Tenth Circuit was not free to adopt its own interpretation in place of the one chosen by the Commission. The Commission's findings reflect a reasonable reconciliation of NGPA Section 121 and Section 101(b)(5) with each other and with the basic statutory objective to balance gas supply and demand.

## ARGUMENT

### I. The Tenth Circuit's Interpretation Is Inconsistent with the Purpose and Legislative History of the NGPA.

The Commission, interpreting and applying NGPA Section 121, held that gas which is qualified in an NGPA category that has been deregulated and removed from Commission jurisdiction must be treated as such, even though the gas also has been qualified in an NGPA category which has not been price decontrolled. The reasonableness of the Commission's interpretation is clear against the backdrop of the NGPA, the provisions of the statute, and the ultimate goal of Congress to achieve a supply and demand balance of natural gas.

Prior to the NGPA, the Federal Power Commission (predecessor to the Commission) had been constrained under the NGA's standard to limit such prices to *cost-based* "just and reasonable" levels, even though those price levels tended to be below the prices dictated by the

market.<sup>8</sup> The Commission's inability to provide adequate wellhead price incentives above the cost-based NGA standard frustrated producer efforts to explore for and develop incremental gas supplies for interstate pipelines. Gas supplies were therefore naturally attracted to the unregulated intrastate markets and, during the 1970's, a severe gas shortage in the interstate market ensued.<sup>9</sup>

In response to this national crisis, Congress redefined and replaced the NGA cost-based standard with higher "just and reasonable" NGPA price ceilings for "first-sale" gas. Further, Congress provided for phased-in deregulation of those ceilings. Both the ceilings and the subsequent provisions for deregulation reflected Congress' ultimate goal, noted by this Court in *Transco*, *supra*, of using market forces to balance the supply and demand for natural gas:

"[T]he NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand.

\* \* \*

"\* \* \* [Congress determined] that supply, demand, and the price of high-cost gas be determined by market forces. To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market."<sup>10</sup>

The Commission's interpretation of NGPA Section 121 to deregulate dual-qualified gas is consistent with this overriding statutory objective. The Tenth Circuit's forced interpretation of the NGPA plainly is not.

<sup>8</sup> See generally, *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 391-93 (1959).

<sup>9</sup> See *Mid-La II*, *supra*, 463 U.S. at 330-31 ("The interstate rates remained substantially below the unregulated prices available for intrastate sales, and the interstate supply remained inadequate.").

<sup>10</sup> *Transco*, *supra*, 106 S. Ct. at 716-17 (1986).

The Tenth Circuit insists that the Commission:

"\* \* \* has confused the ultimate purpose of the statute—'to assure adequate supplies of natural gas at fair prices,' *Transcontinental Gas Pipe Line Corp.*, 106 S.Ct. at 716—with one of several means chosen to accomplish that purpose—phased deregulation. \* \* \* Incentive prices for difficult to produce gas are another means by which Congress sought to increase energy supplies. \* \* \* We will not strain the plain meaning of § 101(b)(5) in order to serve a goal of deregulation that is itself only one of several means adopted to achieve the purposes of the NGPA." 813 F.2d at 1070-71; App. 20a-22a (footnote omitted).

However, the Commission was demonstrably not confused as alleged by the Tenth Circuit. As the Commission carefully explained:

"The Commission recognizes that Congress had two major objectives in mind when it passed the NGPA in 1978. First, in the short term, it maintained a regulatory structure of price controls and, within that structure, provided incentives to encourage exploration and development of new reserves and, second, in the long term, it gradually substituted market forces for regulated prices by phasing in deregulation in 1985 and 1987. \* \* \* The deregulation of certain categories of natural gas as provided in the NGPA is not in conflict with the goal of increasing energy supplies. Indeed, deregulation fosters that goal. Without question, phased deregulation was one of the primary methods utilized by Congress to increase energy supplies." App. at 108a (footnote omitted).

INGAA submits that the real problem is not with the Commission's reasoning but with the Tenth Circuit's failure to recognize the ultimate goal of the NGPA to balance gas supply and demand. This failure is evident from the Tenth Circuit's truncated quotation of this

Court's *Transco* opinion, quoted above. The complete thought of this Court, including the portion omitted by the Tenth Circuit (shown with emphasis) reads as follows:

"The aim of federal regulation remains to assure adequate supplies of natural gas at fair prices, *but the NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand.*"<sup>11</sup>

The Tenth Circuit's reading of *Transco* effectively reads the important words "adequate [gas supplies]" and "fair [prices]" out of the quote. The clear intent of Congress was to have the adequacy of gas supplies and the fairness of prices ultimately determined by market forces.<sup>12</sup> The Tenth Circuit's holding, in contrast, creates price floors as if the goal of the statute was solely to elicit incremental gas supplies, *i.e.*, regardless of price. Moreover, a price is manifestly not "fair" under this market-oriented statute if that price is *imposed* as a regulated price floor.

Again, the intent of Congress was to *balance supply and demand* by setting maximum lawful prices on one hand and, on the other, phasing out controls on new gas

<sup>11</sup> *Supra*, 106 S. Ct. at 716.

<sup>12</sup> As this Court further noted in its *Transco* decision, Congress determined "that the supply, demand, and the price of high-cost gas [should] be determined by market forces." 106 S.Ct. 716-17.

A petition for *certiorari* recently filed in another case by the Shell Offshore producer group concurs:

"While the Commission has authority to specify terms and conditions for transportation provided under Section 311, that authority cannot be read to undermine the clearly expressed congressional intent to prevent any regulatory interference with the free market pricing scheme set out in the NGPA. \* \* \* *Id.*, at 14. Similar statements appear elsewhere in that petition. See, *Shell Offshore Inc., et al., Petitioners, v. Associated Gas Distributors, et al., Respondents*, No. 87—, dated December 14, 1987, at pp. 10-12, 15, 17-18.

supplies to allow market forces to determine the price. Yet basic economic principles hold that if prices are forced above market clearing levels, an *excessive* supply rather than an *adequate* supply will result. Certainly there is no reasonable basis for concluding that Congress intended to rectify the acknowledged and obvious market ordering problem of the pre-NGPA era with the opposite version of the same problem.

INGAA submits that Congress had no intent to force natural gas buyers to pay rates higher than those which would be dictated by the market. Had that been Congress' design, it surely would have established minimum, not maximum, prices. The NGPA ceilings are plainly maximum prices, not minimum prices.<sup>13</sup>

The Commission has sought to give full reign to market forces in its interpretation of the statute. In contrast, the Tenth Circuit would turn the NGPA into a price *support* scheme which would protect producers from downside risks and force gas consumers to pay above-market prices for their gas. Nothing in the language or legislative history of the NGPA supports such an interpretation or result.

## II. The Tenth Circuit's Decision Produces Anomalous and Absurd Results.

The Tenth Circuit candidly admits that its interpretation of the NGPA produces unexpected and bizarre results. For example, the Court notes that its decision creates an

<sup>13</sup> This fact is made very clear in Section 101(b)(9) which is directed to "maximum lawful price[s] under this title" and provides that, regardless of whether gas is regulated or deregulated, the price charged cannot exceed the contract price, even if that price is well below the allowable ceiling price. 15 U.S.C. § 3311 (b)(9). Thus, the statute expressly permits sellers and buyers of first-sale gas to contract for prices at less than the statutory maximums.

"\* \* \* anomalous situation [where] . . . producers seek the regulated ceiling price rather than the deregulated market price. \* \* \* Therefore, § 101(b) (5) can have the unanticipated effect of operating as a price floor for producers. \* \* \*" *Id.* at 1071; App. 23a.

The Court further concedes that in the case of contracts which require the parties to renegotiate the gas price in the event the gas is deregulated, the Court's ruling will create a "Catch 22" situation such that corrective action by Congress may be required. *Id.* at 1068, n. 11; App. 16a-17a. The "Catch 22" situation stems from the fact that typical contract renegotiation provisions are triggered only in the event of deregulation; yet, under the Tenth Circuit's interpretation the determination of whether the gas is deregulated cannot be made until there is a renegotiated price to be compared against the ceiling price. This admission alone eloquently signals the Tenth Circuit's unwarranted intrusion into the administrative process.

Even where there is no "Catch-22" situation, *e.g.*, the contract has no "typical" renegotiation provision, the Tenth Circuit's interpretation would effectively delegate the determination of which gas should be deregulated to private parties. The Tenth Circuit would empower the contracting parties to determine, through the structuring of their contract, whether the gas will be treated as regulated or deregulated.<sup>14</sup> The Commission, as the agency charged with enforcing the provisions of the NGPA, would be relegated to a role of examining and interpreting those dually-qualified gas contracts to de-

<sup>14</sup> Indeed, as the Court noted, in the case of contracts for dually-qualified gas which provide that the parties will renegotiate the contract price in the event of deregulation, the regulated price would always prevail. 813 F.2d 1069, n.11; App. 17a. By executing such a contract, the parties could totally thwart the operation of Section 121 of the NGPA.

termine what price would apply if the gas in question were deemed to be deregulated.<sup>15</sup> The Commission would then have to compare that deregulated price against the regulated price to determine which is higher, *i.e.*, to determine whether the gas should be treated as regulated or deregulated. The endlessness of the administrative burdens attending the Tenth Circuit's holding is apparent. Indeed, such a determination would have to be made for each contract on a monthly or more frequent basis.<sup>16</sup>

The NGPA, however, is structured with specific objective standards for determining whether gas qualifies as "first-sale" gas and, if so, in what category it falls. Thus, it specifies well spud dates, depth of wells, production rates, *etc.*, as controlling criteria. See, NGPA Sections 102 and 108, 15 U.S.C. §§ 3312 and 3318. As Congressman Dingell stated:

"The FERC is intended to play an enforcement role with respect to the ceiling prices, not with respect to enforcement of private contracts *per se*. . . . [I]t is contemplated that FERC's implementation of the bill will be accomplished with minimal interference with contractual relationships."<sup>17</sup>

In contrast to this intended Commission role, the Tenth Circuit would convolute the statutory scheme for deregulation into one requiring an *expansion* of the Commission's regulatory oversight: the Commission must now become bogged down in a spate of proceedings involving the interpretation and enforcement of private contracts.

<sup>15</sup> "The contractual provision that 'could' result in the highest price at a particular moment will establish the applicable category under Section 101(b)(5)." 813 F.2d at 1069, App. 16a-17a.

<sup>16</sup> As the Tenth Circuit ruled, "[s]ection 101(b)(5) therefore requires a comparison of the applicable price for each category at a particular moment." 813 F.2d at 1068; App. 16a-17a.

<sup>17</sup> *Natural Gas Policy Act Information Service*, Para. 101:230, p. 3.

This Court has long held that interpretation of a statute often involves some leeway in ascribing meaning to particular words in order to avoid absurd results or a consequence which would thwart the obvious purpose of the statute. *United States v. Turkette*, 452 U.S. 576, 581 (1981), citing *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965). Certainly, the Commission's interpretation of the NGPA is a reasonable and rational implementation of the intent of Congress and is consistent with the generally accepted meaning of the statutory language.

The anomalies resulting from the statutory interpretation imposed by the Tenth Circuit demonstrate that such substitute interpretation does not meet the "reasoned decisionmaking" standard against which courts routinely measure decisions of the Commission.<sup>18</sup> In the circumstances here present, the Tenth Circuit had a duty to defer to the Commission's interpretation of the statute. *Chevron, supra*.

### III. The Tenth Circuit's Decision Is Inconsistent with the Plain Meaning of the Statute.

Another critical flaw in the Tenth Circuit's reasoning lies in its linchpin declaration that the Commission's interpretation of the word " \* \* \* 'could'—one that considers only the theoretical possibilities—renders § 101(b) (5) meaningless." 813 F.2d at 1068; App. 16a. The significance of this finding is that, without it, the Tenth Circuit could not have gone on to adopt and impose its own interpretation of NGPA Section 121 as a substitute for that adopted by the Commission.

Contrary to the holding of the Tenth Circuit, the Commission's reading of the word "could" in Section

<sup>18</sup> *E.g., Greater Boston Television Corp. v. Federal Communications Commission, supra*.

101(b) (5) is consistent with the statute's plain meaning, is clear and unambiguous, is meaningful, and does not render Section 101(b) (5) meaningless. This is evident from the words of the statute as well as the overall objective of the NGPA to achieve deregulation of most first-sale gas within the time schedule established in NGPA Section 121.

It is well established that where the statutory language is clear on its face, it is controlling.<sup>19</sup> The Tenth Circuit, however, neglected this rule and, in contrast to the Commission's consistent and reasoned interpretation of NGPA Sections 121 and 101(b) (5), adopted an arbitrary, forced, and capricious interpretation requiring an actual price comparison at any given moment of time, as if the phrase "could result in the highest price" said "would or will result in the highest price."

Producer Respondents suggest that "Congress would not have seized upon a subtlety so obscure as the Commission's current interpretation of 'could' had it intended that deregulated treatment must always apply to dual category gas eligible for decontrol."<sup>20</sup> But there is nothing obscure about the difference in meaning between the word "could", as used in NGPA Section 101(b) (5), and the words "will" or "would" which were not used in that section.

The Producer Respondents correctly note that the NGPA was a "closely negotiated . . . compromise [in-

<sup>19</sup> *E.g., Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.")

<sup>20</sup> "Brief in Opposition to Petitions for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit" filed herein on October 30, 1987, at 11.

volving] . . . 18 months of legislative battles.”<sup>21</sup> Given this lengthy history, there is no reason to believe that the words appearing in the statute were imprecisely chosen or used. Rather, that extended history suggests that the word “could” was used deliberately and that it was intended to convey its usual meaning.<sup>22</sup>

Moreover, an examination of the entire statute reveals that Congress was fully aware of the distinction between the words “could” and “would” or “will.” For example, Congress in NGPA Section 102(c)(1)(C)(ii) provided for an exclusion from the definition of new onshore reserves, excluding a reservoir penetrated by an old well where “natural gas *could* have been produced in commercial quantities from such reservoir through such old well before April 20, 1977.” 15 U.S.C. § 3312(c)(1)(C)(ii) (emphasis added). Clearly, the meaning of the word “could” in that provision of the NGPA is consistent with the Commission’s interpretation of that word in Section 101(b)(5).<sup>23</sup> That is, it refers to a possibility, not a certainty or fact.

It is a well established rule of statutory construction that where a word is used in more than one place in a statute it should be construed to have the same meaning in each instance.<sup>24</sup> Application of that rule to this case

<sup>21</sup> *Id.* at 11-12.

<sup>22</sup> Unless otherwise indicated, words should be given “their ordinary, contemporary, and common meaning.” *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citations omitted).

<sup>23</sup> Indeed, any other reading of that provision would render it meaningless.

<sup>24</sup> *E.g.* *Barnson v. United States*, 816 F.2d 549, 554-55 (10th Cir. 1987); *Firestone v. Howerton*, 671 F.2d 317, 320 n.6 (9th Cir. 1982); *United States v. Nunez*, 573 F.2d 769, 771 (2nd Cir.), *cert. denied*, 436 U.S. 930 (1978). But see *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1184-85 (6th Cir. 1982), *aff’d*, 464 U.S. 165 (1984), where the Sixth Circuit held that a term in a

leads to the conclusion that Congress did not use the word “could” as synonymous with “would” or “will.”

This conclusion is reinforced by the fact that when Congress intended to refer to more than “possible” results, it used the word “will” or “would.” For example, in Section 311(b)(7) of the NGPA, 15 U.S.C. § 3371, Congress provided that if the Commission’s grant of sales authority under that section “would” produce specified impacts the Commission would be required to disapprove the application. In each instance, Congress used the word “would” as describing an actual impact resulting from a grant of such authority, and not simply one of several possible results as would have been the case if the word “could” had been used instead of “would.”<sup>25</sup> Similarly, Congress used the word “will” in Section 504(b)(1), 15 U.S.C. § 3414(b)(1), to connote a definite result rather than a possible one.

In each instance noted above where Congress used the term “would” or “will” in the NGPA, substitution of the word “could” would have significantly altered the meaning of the particular statutory provision. This demonstrates beyond reasonable argument that Congress did not use those words synonymously in the NGPA.

As this Court has said, “[n]ormal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ . . . .” *Offshore Logistics, Inc. v. Tallentire*, 106 S.Ct. 2485, 2495 (1986). Congress clearly understood the difference in the meaning between the term “could” on the one hand and

statute could have different meanings where a contrary holding would produce an absurd result. The Supreme Court affirmed on collateral estoppel grounds, and did not reach the merits of the case.

<sup>25</sup> Other instances where the term “would” is used in the same manner are found in Section 315(b)(2) and (3), 15 U.S.C. § 3375 (b)(2) and (3), and Section 503(c)(2), 15 U.S.C. § 3413(c)(2).

"would" or "will" on the other, and used each accordingly in the NGPA.

Moreover, there is no "compelling evidence" that Congress intended NGPA Section 101(b)(5) to be read in a manner that would thwart the deregulation goal explicitly mandated in NGPA Section 121. Yet, the import of the Tenth Circuit is to do just that.

Further, the reading of Section 101(b)(5) imposed by the Tenth Circuit frustrates the explicit statutory command of NGPA Section 121 that, on the dates specified, the Commission must deregulate gas which is qualified for deregulation under that section. It is ludicrous to interpret clear congressional intent to deregulate natural gas and to let the competitive forces of the market set prices as an intent to provide producers a security blanket of price supports if the market does not provide them with a price high enough to meet their satisfaction.

#### IV. The Tenth Circuit's Decision Should Be Reversed under This Court's Decision in *Chevron* Requiring Judicial Deference.

The Commission's interpretation of NGPA Section 121 and Section 101(b)(5) is entitled to judicial deference. In *Chevron, supra*, this Court explained that a court is not free to adopt its own interpretation in place of the one chosen by the agency. Rather, if the agency's

"\* \* \* choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States v. Shimmer*, 367 U.S. 374, 383 \* \* \* (1961).<sup>26</sup>

This Court has also held that the deference to be accorded to an agency's interpretation is strongest where,

<sup>26</sup> *Supra*, 467 U.S. at 844.

as here, the agency is carrying out its congressionally-imposed mandate.<sup>27</sup>

INGAA submits that the Commission's construction of NGPA Sections 121 and 101(b)(5) to deregulate gas which has been dually qualified should have been affirmed by the Tenth Circuit. The Commission's findings reflect a reasonable reconciliation of those statutory provisions with each other and with the basic statutory objective to balance gas supply and demand. As such, those findings should have been accepted by the Tenth Circuit under this Court's directive in *Chevron*.

#### CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Tenth Circuit below and affirm the interpretation of the NGPA which the Commission had found proper.

Respectfully submitted,

JOHN H. CHEATHAM, III \*  
EDWARD B. MYERS  
INTERSTATE NATURAL GAS  
ASSOCIATION OF AMERICA  
Suite 601  
1660 L Street, N.W.  
Washington, D.C. 20036  
(202) 293-5770  
*Attorneys for Amicus Curiae*  
\* Counsel of Record

January 14, 1988

<sup>27</sup> " \* \* We have elsewhere held that we may not, 'in the absence of compelling evidence that such was Congress' intent . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'" *Permian Basin Area Rate Cases*, 390 U.S. 747, 780." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968) (additional citations omitted).

## APPENDIX

1988

**INTERSTATE NATURAL GAS ASSOCIATION  
OF AMERICA  
ACTIVE MEMBERSHIP**

AlaTenn Resources, Inc.  
Arkla, Inc.  
Blue Dolphin Pipe Line Company  
The Coastal Corporation  
Columbia Gas Transmission Corp.  
Consolidated Natural Gas Company  
El Paso Natural Gas Company  
Enron Corp.  
Granite State Gas Transmission, Inc.  
Great Lakes Gas Transmission Company  
Kentucky West Virginia Gas Company  
KN Energy, Inc.  
Michigan Gas Storage Company  
MidCon Corp.  
Mountain Fuel Resources, Inc.  
Pacific Gas Transmission Company  
Pacific Interstate Company  
Panhandle Eastern Corporation  
SONAT, Inc.  
Tenneco Gas Pipeline Group  
Texas Eastern Gas Pipeline Company  
Texas Gas Transmission Corporation  
Texas Oil & Gas Corporation  
Transco Gas Company  
United Gas Pipe Line Company  
Valero Interstate Transmission Company  
Valley Gas Transmission, Inc.  
The Williams Companies

1988

**INTERSTATE NATURAL GAS ASSOCIATION  
OF AMERICA  
ASSOCIATE MEMBERS**

Amoco Production Company  
ARCO Oil and Gas Company  
Atlanta Gas Light Company  
The Brooklyn Union Gas Company  
Chevron USA  
Cities Service Oil and Gas Corporation  
Conoco Inc.  
Entex, Incorporated  
Exxon Company, U.S.A.  
John H. Hill  
HNG Oil Company  
Kerr-McGee Corporation  
Kinsey Interests, Inc.  
Laclede Gas Company  
Lear Petroleum Exploration Company  
Marathon Oil Company  
Mewbourne Oil Company  
National Fuel Gas Company  
NUI Corporation  
Oklahoma Natural Gas Company,  
a Division of ONEOK Inc.  
Phillips Petroleum Company  
Shell Oil Company  
Southern California Gas Company  
Sun Exploration & Production Company  
Texaco U.S.A.  
Union Pacific Resources Company  
Unocal Corporation